Supreme Court, U.S.
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In The
Supreme Court of the United States

In Re: Summary Judgement of Race Discrimination Case

KELVIN J. HURDLE,

Petitioner.

v.

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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5700

QUESTIONS PRESENTED

1. Is Procedural Due Process of the Fourteenth Amendment violated, when summary judgement is rendered and there are material facts that are in dispute and it is not "perfectly clear that there are no issues in the case"?

2. Is Procedural Due Process of the Fourteenth Amendment violated, when summary judgement is rendered and the trier of facts failed to view the most favorable of possible alternatives inferences from the evidence in plaintiff's behalf?

3. Is Procedural Due Process of the Fourteenth Amendment violated, when summary judgement is rendered in a case and there is direct evidence of charts that show a disparate of treatment between whites similarly situated?

4. Do unreasonable and historically hostile comments of a white supervisor, creates a sufficiently severe, pervasive or abusive work environment and violates the First Amendment of a protected class employee?

5. Does the continual unlawful acts of discrimination occurring within the requisite time period and motivated by the same upper manager but not same supervisor, sufficient to resuscitate a discriminatory demotion and reassignment claim?

6. When the court allows a handwriting expert to distinguish signatures that are in dispute; is summary judgement for the respective issue appropriate?

PARTIES TO THE PROCEEDING

Petitioner

Kelvin J. Hurdle,

Respondent

Virginia Department of Environmental Quality

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The opinions of the United States Court of Appeals for the Forth Circuit in Kelvin I. Hurdle, Plaintiff-Appellant, versus The Commonwealth of Virginia, Department of Environmental Quality, Defendant-Appelle are unpublished. Copies of the Opinions are reproduced in the Appendix hereto at Appendix pages at 1 and 25. The Orders of the District Court for the Eastern District of Virginia are included in Appendix at Appendix page 4, 26 and 27.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit filed its Mandate on the judgement entered by the court on July 16, 2001. A timely filed Petition for Rehearing and Rehearing En Banc was denied on August 22, 2001. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The court's jurisdiction is invoked pursuant to 28 U.S.C § 1254 (1) and 2106.

STATUTORY PROVISIONS INVOLVED

This action is brought on behalf of Kelvin J. Hurdle seeking to implement the provisions of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e, et seq. This Court has subject matter jurisdiction pursuant to (a) 28 U.S.C. § 1331, because the case arises under the Constitution and laws of the United States; (b) 28 U.S. C. § 1343 because this action seeks redress and damages for violation of 42 U.S.C. § 1983 and 1985, and in particular, the due process and equal protection provisions of the United States Constitution, including the rights protected in the Fifth, Seventh, Ninth and Fourteenth Amendments. This Court has jurisdiction of the action under 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1345.

Venue is appropriate in this judicial district under 28 U.S.C. § 1391 (b), because Defendant is a state agency

functioning in Richmond, Virginia, and a substantial part of the events giving rise to this complaint that occurred in Richmond, Virginia. Defendant, The Department of Environmental Quality is a state agency maintained and funded in significant part by the Commonwealth of Virginia.

STATEMENT OF THE CASE

Mr. Hurdle is an African-American male. He has been employed by DEQ since 1988, when he was hired as a Geologist. He was promoted in 1989 to the position of Geologist C, then again in 1996 to the position of Training and Development Manager ("TD Manager"). 0n November 18, 1998, during an alleged reorganization of the DEQ, Mr. Hurdle was reassigned to the position of Environmental Engineer Senior. This was the second move of Mr. Hurdle out of the TD Manager's position. The first move occurred in 1997 where a White female as Training Manager replaced Mr. Hurdle for 180 days. Mr. Hurdle was recalled to the TD Manager's position in February 1998 where he met the requirements of the job. It is the reassignment to the position of Environmental Engineer Senior in the Waste Division and the unsupported performance assessment of not meeting the job expectations that triggered Mr. Hurdles' various claims of race discrimination.

Mr. David Paylor the Manager motivated the continued discrimination made the assessment that the training manager's " job was essentially administrative and was graded too high" when Mr. Hurdle was in the position. When Mr. Shelton was given the training manager's duties the grade level for the duties were ranked at a grade 16. Mr. David Paylor the Manager motivated the continued discrimination, made comments to Mr. Hurdle stating to Mr. Hurdle that he was not going to have him making claims of racial discrimination. This event occurred while Mr. Hurdle was in his new position as Environmental Engineer Senior in December 1999.

Plaintiff was required to accept an Environmental Engineer Position or be terminated. While working in the Environmental Engineering position, Plaintiff was consistently subjected to unequal terms and conditions of employment because of his race black. A white male co-worker also an Environmental Engineer reports to the same supervisor as the plaintiff. Plaintiff's Supervisor, allows white male counterpart to work for overtime pay in order to complete projects. Yet plaintiff's requests for compensation time for overtime hours already worked and were routinely denied. Plaintiff's and plaintiff's white male counterpart's workload would be considered equal. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

Plaintiff is frequently the target of derogatory comments by his supervisor. Plaintiff has on several occasions requested that his supervisor cease the use of derogatory comments. On or about May 17, 1999 the supervisor commented in a derogatory tone " I am going to whip you into shape". Within a month of that date, he commented " you don't have common sense". Other comments included "you have a warped mind", and "you don't have common sense". Nearly all-verbal communications by the supervisor are done with malice and in a condescending manner.

Plaintiff's co-workers have witnessed plaintiff's supervisor make racially foul comments pertaining plaintiff. White employees are not subjected to the same environment. The supervisor behavior is sufficiently severe and pervasive that it alters the conditions of the plaintiff's employment. Additionally, the behavior creates and abusive working environment. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

While working as an Environmental Engineer, plaintiff requested historical letter information that was stored on a computer disc that would assist in the performance of his job.

The request was made and denied twice. Later, plaintiff personally observed a newer white male DEQ employee, using the same computer disc the plaintiff requested request six months earlier. Plaintiff is subject to unequal terms and conditions of employment. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

Plaintiff has been intentionally placed in a working position and denied the necessary opportunities and reasonable accommodations as routinely provided for white employees. Plaintiff has worked for over 11 years and has met or exceeded the expectations of the position. Plaintiff supervisor fraudulently affects plaintiff performance by changing original correction request for letters, and pretends the requested corrections were original. The supervisor ridicules plaintiff about not including comments that were not originally requested. White employees are not subjected to the same behavior. The supervisor behavior is sufficiently severe and pervasive that it alters the conditions of the plaintiff's employment. Additionally, the behavior creates an abusive working environment. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

On Friday, December 3, 1999, at 4:00 p.m. plaintiff attempted to discuss with management the Title VII violations. Management denied that discrimination had occurred, and refused to gather facts or investigate plaintiffs concerns. Plaintiff was told by Mr. Dave Paylor (Deputy Director) that if he believed that discrimination had occurred, he should "Play your hand". Plaintiff's credibility was questioned by management and plaintiff was denied due process to resolve his complaints of discrimination. In contrast, personnel issues are heard when presented by white employees. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

Plaintiff is currently suffering retaliation as the result of participating in a protective activity (protesting discrimination) and attempting to discuss the Title VII issues with management. Previous erroneous performance ratings issued to plaintiff and subsequently reversed by management are re-appearing as the result of plaintiffs attempts to discuss incidents of racial discrimination with management. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

A facially neutral test such as the decision making processes and hiring practices disproportionately impact blacks. Blacks are excluded from first line supervision in nearly all first lines supervision positions. Higher positions than first line supervisors are mainly acquired through the political appointment process. There exists a pattern and practice of discrimination.

DEQ management promised plaintiff it would change the reporting structure and assign plaintiff to a new supervisor. Plaintiff had reminded management that this action was taken by management when two white employees had a conflict. Management changed the reporting structure to alleviate the conflict with the white employees. Management continued to allow the hostile and abusive environment to exist for plaintiff and did not make the promised change of reporting structure. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

White employees that failed to meet performance expectations were given other jobs within DEQ where they were able to meet their expectations. The plaintiff has been moved from a position where he exceeded the expectations and has been placed in a position where the supervisor alleges that expectations are not met while taking actions to prevent plaintiff from accomplishing his expectations. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

REASONS FOR GRANTING THE PETITION

1. **The Appropriateness of Defendants' Motion for Summary Judgement. DEQ'S motion for summary judgement is only appropriate if there are no genuine issue as to any material fact, which would entitle defendant to judgement as a matter of law. Fed. R. Civ. P. 56(c). Since DEQ is the moving, the burden is on it to show the absence of any genuine issue of material fact.**

The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to Mr. Hurdle since he is the opposing the motion. Ross, Id., at 364. Only where it is "perfectly clear that there are no issues in the case" is summary judgement proper. As the nonmoving party, Hurdle is entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from the evidence drawn in his behalf; and to be given the benefit of all favorable legal theories invoked by the evidence as considered. Ross at 364. Eventes v. Shevin, 407 U.S. 67.(Federal Rule of Civil Procedure 38).

Federal Rule of Civil Procedure 56(C) required that the Court enter judgement against a party who, "after adequate time for discovery fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317,322 (1966). The essence of the inquiry that the Court must make is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby. Inc., 77 U.S. 242, 251-52 (1986). Summary judgement is proper "if the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." Id., at 248.

2. The Demotion Decision Claim Is Timely Because it Represents a Continuing Violation

The defendant argues that Mr. Hurdle's claim that he was demoted for Training Manager's position because of his race is time barred because he filled this claim with the Equal Employment Opportunity Commission (EEOC) on February 9, 2000, which was more than 300 days after the demotion and occurred which was on November 1, 1998.

In order to avoid the "continuing violation" rule, defendant argues that the reassignment was "put into effect by John Cunningham, a black male, who is not implicated in Mr. Hurdle's claims of disparate treatment, hostile environment, and retaliation." This argument is without merit because the complaint that is before the Court is based on a Title VII claim and the proper party in such a claim is the employer named in the EEOC Charge of Discrimination. Mickel v. South Carolina State Employment Service, 377 F.2d 239,242 (4th Cir. 1967), cert. denied, 389 U.S. 877,88 S.Ct.177, 19 L.Ed.2d 166 (1967); Alvarado v. Bd. Of T. of Montgomery Com. Coll., 848 F.2d 457 (4th Cir. 1988).

Defendant argues that the Fourth Circuit has not explicitly adopted a continuing violation test. This assertion is simply not true in light of the holding in Brinkley-obu v. Hughes Training, 36 F.3d 336 (4th Cir. 1994) in which the Court stated that "[a]long with the Supreme Court, we have applied the doctrine of continuing discrimination to Title VII and Equal Pay Act compensation cases in which paychecks have been characterized as current or "continuing" violations. Nelson v. Stone, 958 F.2d 584, 592 (4th Cir. 1992); Brewster v. Barnes, 788 F2d 985, 993 (4th Cir. 1986); and Jenkins v. Home Ins. Co., 635 F2d. 310, 312 (4th Cir. 1980)

Given the litany of events that Mr. Hurdle has experienced during his employment with the defendant and which he claims are discriminatory and/or retaliatory, the defendant's contention that the demotion and reassignment

"simply constitute[d] the inevitable consequences of an earlier allegedly discriminatory decision do not suffice to create a continuing violation" is a factual determination that has been place in dispute by Hurdle in his response to the motion for summary judgement. The case cited by defendant, Thompson v. Town of Front Royal, Civ. Action no. 5:98cv 00083, 2000 U.S. Dist. LEXIS 15254, (W.D. Va. October 3, 2000) (unpublished) refused to apply the continuous violation rule regarding a series of separate but related acts because there was no evidence that an actual violation occurred with the requisite time period. The Court determined that assignment of the plaintiff to menial tasks after the plaintiff was promoted, did not resuscitate an earlier failure to promote claim.

In the instant case, Mr. Hurdle has alleged continual unlawful acts within the requisite time period, which does resuscitate his demotion and reassignment claim.

3. Mr. Hurdle Has Alleged a Meritorious Demotion Claim.

Defendant argues that Mr. Hurdle's demotion "does not state a claim of race discrimination." In arguing that Hurdle "has no direct proof that John Cunningham, an African American, intentionally discriminated against him" in the demotion decision, defendant failed to consider the rather suspicious explanation that Mr. Cunningham gave for the demotion in his affidavit, to wit, that he was motivated to demote Mr. Hurdle because he felt that Mr. Hurdle's career was stalling in the to return to substantive work for the agency." ¶14, Cunningham Aff. What is noteworthy about this claim was that Cunningham "unstalled" Mr. Hurdle's career by demoting him rater than granting his request for a lateral transfer. There is also the incongruity in Cunningham's statement that he "reviewed Mr. Hurdle's 1998 performance review [and] I felt Mr. Shelton gave him and "inflated grade" 14, Cunningham Aff. Cunningham signed this evaluation and while there was

space for him as the reviewer to make comments, he made no mention that he felt the grade was inflated. (Exhibit 17, Hurdle Transcript, Encl. I.)

Mr. Hurdle has met the order of proof courts should use in Title VII cases by establishing a prima facie case that he: (1) is in a protected class, (2) that he suffered an adverse employment action; (c) at the time, he was performing at a level that met his employer's expectations; and (d) that his position remained open or was filled by a qualified person outside the protected class. Texas Dept. of Community Affairs V. Burdine, 450 U.S. 249 (1981); Saint Mary's Honor Ctr. v. Hicks, 113 S.Ct.2742 (1993); Williams v, Cerebonics, Inc., 871 F.2d 452 (4th Cir. 1989).Wilson v. Taylor, 733 F2d 1539 (1984).

The first element is obvious, given that Mr. Hurdle is an African American. The second element, that he suffered an adverse personnel action is established by the fact that he was demoted one pay grade. It is immaterial that he did not experience a cut in salary. With respect to the third element, Mr. Hurdle was performing at a level that met his employer's expectations as evidenced by his 1998 performance review in which he was rated that he met the expectations of his position. (Exhibit 17, Hurdle Transcript, Encl. I.)

With respect to the last element, Mr. Hurdle's position was taken by Joe Shelton, a white male who had virtually no experience in the duties of Training Manager. Defendant stated in its argument that David Paylor's assessment was that the training manager's "job was essentially administrative and was graded too high."The defendant propounded discovery to Mr. Hurdle. Mr. Hurdle's response to Interrogatory No. 7 created a factual dispute that makes summary judgement inappropriate regarding the demotion claim. Interrogatory 7 asked: "State any and all reasons that support your belief that the "demotion" identified in paragraph 4 of your complaint was the result of racial discrimination." Mr. Hurdle answered: "Joe Shelton, my supervisor as training manager, told me

that upper management had discussed removing me from the training manager position, and could not give him a reason for the action. When I asked for a legitimate, business reason for demotion, I received no answer.

There were also some peculiar and questionable circumstances surrounding my demotion. At the time of my demotion, Joe Shelton was in the position of Director of Human Resources, which was a Level 16 position. He told me that he was told by John Cunningham, Director of Administration that he was being taken out of his Human Resources position and would assume my duties as Training Manager which was a Level 14 position, at least when I performed those duties.

Shelton complained that if he assumed those duties, it would mean that he was going to receive a two level demotion from a Level 16 to a Level 14. Cunningham then made arrangements to have Shelton's new position changed from Training Manager to Assistant Director of Administration and the position was given a Level 16 designation. At the time of Hurdle's demotion, he received a satisfactory performance evaluation and he met of the requirement for the position. He was better qualified than Shelton to continue the duties as Training Manager because Shelton had absolutely no experience or training for that position.

Also, there was an existing vacancy in the Department for an Environmental Engineer, Level 14. I was minimally qualified for that position. I was not considered for that position despite the fact that there is a policy and practice in the Department that requires that prior to demoting an employee, that an attempt be made to laterally move that employee is minimally qualified. This policy was not exercised in my case, while it was exercised for Shelton's benefit."

Mr. Hurdle's answer to Interrogatory No. 7 created a reasonable inference that there was a motive to demote Mr. Hurdle, which was independent of reduction in force and restructuring plan by the

Agency. Mr. Hurdle asked for a reason and was not given one. The proffer by the defendant of an alleged legitimate and nondiscriminatory reason was only made after Mr. Hurdle complained about the demotion as being racially motivated. Mr. Hurdle also states in his answer that Shelton was to be given the training manager's duties and job title, but his job title was changed after he complained that if the title was not changed he would suffer a two pay grade demotion. It is interesting to note that Shelton remained in his pay grade 16 classification after he assumed the duties of training manager despite Paylor's assessment that the position "was graded too high."

Defendant argued that the reassignment affected both Mr. Hurdle and Shelton, "similarly." Given that Mr. Hurdle was demoted and Shelton remained in his pay grade and took on duties that Paylor considered was "too high" for grade 14, the argument that Mr. Hurdle and Shelton were similarly affected is laughable and without factual or logical merit.

Mr. Hurdle has met the prima facie showing requirements. At this point, the burden shifts to the defendant to establish legitimate, nondiscriminatory reasons for the reassignment. There is at this stage a genuine factual dispute as to whether the articulated reasons for the reassignment are legitimate or whether they are either false or pretext.

4. Mr. Hurdle Established a Factual Dispute Whether the Denial of Approval for Compensatory Time Was Discriminatory.

The record at this point with respect to Freeland's denial of Mr. Hurdle's request for compensatory time is as follows: Mr. Hurdle testified in his deposition that Shawn Davis, who Freeland had assigned to advise Mr. Hurdle, told Mr. Hurdle that he should get comp time for coming in on weekends as longed as he worked on annual reports. This caused Mr. Hurdle to raise comp time issue with

Freeland. Hurdle Depo. Tr. p. 92, lines 9-25. Mr. Hurdle also testified that Larry Syverson told him in specific and unequivocal language that received comp time for doing annual reports. Mr. Hurdle Depo. Tr. p. 93, lines 1-17.

Neither Romanchik nor Freeland denied that Syverson received comp time in their affidavits. As the nonmoving party, Mr. Hurdle is entitled to have his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, and that he be given the benefit of all favorable legal theories invoked by the evidence as considered. Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985).Wilson v. Taylor 773 F2d 1539 (1984).

5. DEQ Is Not Entitled to Summary Judgement on Mr. Hurdle's Hostile Work Environment Claim.

For purposes of argument, Mr. Hurdle will incorporate in this argument his claims of deficiencies in training and his negative evaluations.

The paradigm that Mr. Hurdle must satisfy in establishing his hostile environment claim, requires him to prove that (1) DEQ harassed him because of his race, (2) the harassment was unwelcome, (3) it was sufficiently severe or pervasive to create and abusive working environment, and (4) there is a basis to impute it to the employer. Smith v. First Union, 202 F.3d 234 (4th Cir. 2000); Spicer v. Virginia, 66 F 3d 705, 710 (4th Cir. 1995) (en banc).

DEQ argues that Mr. Hurdle's claims rise only to the level of disagreements, and hurt feelings that may have caused Mr. Hurdle stress, however, "there is no hint of racial harassment, or that Mr. Hurdle's reactions were reasonable." (DEQ's Brief, p.25)

There should be no question that Mr. Hurdle has met the second elements in the paradigm, that the conduct that he complained about was unwelcome. The first element, that he was so treated because of his race is met because there has been no showing that white employees of the defendant were exposed to

or suffered the same conduct as did Mr. Hurdle. Since DEQ is the moving party, Fed. R. Civ. P. 56(c) places the burden on it to show the absence of any genuine issue of material fact.

Except for its contention that Joe Shelton was similarly affected by the reassignment, DEQ has not shown a white person who was subjected to equivalent conduct. With respect to the third element, Mr. Hurdle has established the following specific instances in his response to Interrogatory No. 4 that DEQ propounded to him:

> (4) Please identify and fully describe each and every incident of racial discrimination, harassment and/or retaliation which you claim you were subjected to by any agent or employee of Defendant while you have been employed by DEQ, including the name of the offending employee, position of that employee, nature of the alleged racial discrimination, harassment and/or retaliation, the date of the alleged incident(s) and any adverse employment action, or threats thereof, suffered by you."
>
> **ANSWER:**
>
> The following represent incidents of racial discrimination, harassment and/or retaliation, all of which adversely affected the terms and conditions of my employment:
>
> a. In June 1998, I attempted to join in with a few HRO staff in a normal discussion. Carol Harris, a white female of DEQ/HRO, whose position is unknown called me "boy" and when I looked incredulously, at her, she repeated it. I told Joe Shelton about the incident and he said he would speak to her about it.

b. White staff has received personal faxes in the office and no action was taken against them. However, when I received a personal fax at the office, Howard Freeland gave me a written reprimand, which caused me, to be embarrassed, humiliated and depressed.

c. During the time I was under Howard Freeland's supervision, he created a hostile work environment. Nearly all of Freeland's verbal communications with me were done in a malicious and condescending manner. I constantly had to ask Freeland to calm down when he interacted with me. It was rare when Freeland was not hostile and argumentative toward me. Freeland's interaction with white staff completely different in that he communicated with them in a calm and pleasant demeanor. Examples of Freeland's derogatory comments directed at me are: He has said, "I am going to whip you into shape" On or about May 17,1999, he said to me, "You don't have common sense; you are not professional!" He also said to me, "You have a warped mind." I do not recall the date of the last comment.

d. Freeland treated me differently from my white coworkers regarding my arrival time at work. Freeland almost daily monitored my time of arrival at work. When I was fifteen minutes late, Freeland required me to fill out a leave request and charged my lateness to my accrued leave, while white staff were allowed to make up their late arrival by working the additional time at the end of the day and annual leave was not used to make up for their late arrival.

e. Freeland told me on several occasions that he did not have time to discuss my work acting as if he was too busy to engage me in positive and productive discussions. Immediately after saying

this to me, I watched him fraternizing with white male staff for a considerable length of time, which indicated to me that he was not that busy. When Freeland saw me watching him fraternizing, he would shut his office door.

f. The agency maintains a computer system on which is stored historical information regarding previous work done by the agency. This information is important in the work we do at the agency and it greatly simplifies a lot of the work we do. When I requested Freeland to allow me to access this information to assist me in working on my assigned projects, he regularly refused and whites were freely given access to this information. One example of this occurred when Jim Bernard, a white male, was given access to this information within a week after he arrived at the agency. When I mentioned this to Bernard and told him that I had been denied access to this same information, he acted surprised and told me that he would put the information in a common file that did not require limited access. On July 27, 2000, Bernard and I were traveling to Chatham, Virginia for a public hearing. During that trip, Bernard said to me without any prompting from me that he really believed that Howard Freeland is a racist. He said he came to that conclusion because Freeland treated me different from the way he treated my white coworkers.

g. From December 1998 to June 2000, there was a practice at the agency or at least in the department in which I worked to give all employees job training. Freeland refused to assure that I was given adequate training. For example, Freeland would set up specific training protocols for whites to assure that they were trained in specific areas of their duties and

responsibilities. He would monitor their training progress. Freeland refused to do the same for me. In fact, Freeland would instruct me to do a specific project knowing full well that I had not received any training in that area. My employment was adversely affected because it took far more time to do the work, and that would not have been necessary had I been given proper training. During the same time period, when whites first came to the department, they were assigned a mentor. I was in the department for more than eighteen months before Freeland got around to assigning me a mentor.

h. From December 1998 to the present, Freeland refused to approve compensatory time to offset the excessive time that I needed to complete my assigned projects, while he approved compensatory time for white staff on a regular and consistent basis.

i. From March 1999 to the represent, from time to time I would find an inadequate monitoring system for landfills in the State. When I made this observation in my reports, Freeland took issue with my findings and ordered me to reverse my opinion and certify that the monitoring system was working properly. He did this without giving or explaining to me a scientific justification as to why my observations and conclusions were wrong. When Freeland dealt with my white coworkers and reversed their findings and observations, he gave them a detailed scientific explanation. This was not simply a difference in his attitude and demeanor toward me, but he also deprived me of valuable training because by explaining his reasoning as he did with my white coworkers he provided them an opportunity to learn from their mistakes and to have positive feed back regarding their work.

j From December 1998 to September 1999, Freeland intentionally created a communication barrier during my first months on the job, effectively reducing the quality of my training. No training plan was ever devised, presented or reviewed with me. Although an overall plan was presented to HRO, its details were never reviewed. In contrast, quality training time was spent with new white employees this year. There were several acts of retaliation that occurred as follows:

1. After I was evaluated as meeting the requirements of the job, I was removed from the training manager's position in December 1998 and demoted. See my actually fact allegations in my Complaint.
2. On May 31, 2000, I was given an interim performance evaluation, which stated that I did not meet the requirements of my position. My federal complaint was filed on May 26, 2000 and served on the Department that same day. The Department and Freeland were aware of the complaint before the interim performance evaluation was prepared.
3. On June 8, 2000, I was given a counseling memo for alleged poor performance.
4. On July 28, 2000, I received a counseling memo for not attending a non-mandatory meeting on June 13, 2000, which was six weeks prior to the incident. The memo was given one day after I attended a pretrial conference with Judge Payne, during which he advised the Department to find me another position with another agency. I later spoke with the Department's Director, Dennis Tracey who was in the parking garage the following day on July 28, 2000. He

told me that since I have gone to court he was going to do what he had to do. Mr. Treacy was angry and drawn during the encounter in the parking deck. During my previous encounters with Treacy, he was always friendly. Freeland fraudulently changed a notation on a Report Cover Sheet, Tracking ID WP2000 1003 with a response date of 8/24/00 that was handed to me. On this sheet there was a circle drawn around the word "Yes" and a line drawn from the circle to the center of the sheet where another circle was drawn around the word "No". Freeland alleged that I made the handwritten entry and wrote the word "No" on the sheet, when in fact he was the one that did this. Freeland then reprimanded me for an act that he committed and repeated his false and fraudulent accusation in the presence of Leslie Romanchik on August 11, 2000. I notified Romanchik and Freeland regarding this on or about September 7, 2000.

The extent, frequency and duration of negative conduct on the part of DEQ employees, and especially Freeland, constituted racial discrimination, deficiencies in training and negative evaluations so that this Court can conclude that Mr. Hurdle was subjected to sufficiently severe or pervasive negative conduct that it created and abusive working environment.

5. DEQ is Not Entitled to Summary Judgement on Mr. Hurdle's Retaliation Claim. Mr. Hurdle has established a prima facie case of retaliation because he has shown (1) he engaged in a protected activity; (2) the employer took adverse action; and (3) there was a causal connection between the two.

Ross v. Communications Satellite Co., 759 F.2d 355, 365 (4th Cir. 1985). All of Freeland's conduct toward Mr. Hurdle after Mr. Hurdle filed a claim with the EEO of Virginia's Department of Personnel and Training on August 26,1999 is temporally related to this protected activity. Freeland's claim that his negative action grew out of his frustration with Mr. Hurdle can not be judged by the Court in a motion for summary judgment process. David Paylor's comments to Mr. Hurdle that he should not make claims of discrimination were taken by Mr. Hurdle as a threat and at this stage cannot be ruled out as not being retaliatory. Given the acrimonious relationship between Mr. Hurdle and his superiors, any effort by DEQ to prove that their actions were motivated by a legitimate, non-retaliatory reasons would require the Court to make a credibility determination. DEQ's argument that Mr. Hurdle suffered no adverse action is not supported by the record. The hostile work environment that was clearly evident is sufficient to establish that Mr. Hurdle in fact suffered adverse action.

CONCLUSION

The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to Mr. Hurdle since he is opposing the motion. Ross, Id., at 364. Only where it is "perfectly clear that there are no issues in the case" is summary judgement proper. As the nonmoving party, Mr. Hurdle is entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible

alternative inferences from the evidence drawn in his behalf; and to be given the benefit of all favorable legal theories invoked by the evidence as considered. Ross at 364.

The Appropriateness of Defendants' Motion for Summary Judgement. DEQ'S motion for summary judgement is only appropriate if there are no genuine issue as to any material fact, which would entitle defendant to judgement as a matter of law. Fed. R. Civ. P. 56(c). Since DEQ is the moving, the burden is on it to show the absence of any genuine issue of material fact.

WHEREFORE, Mr. Hurdle requests that the Court rescinds and amends summary judgment.

Respectfully Submitted,

Kelvin J. Hurdle
Petitioner Pro-se
5001 Hallmark Court
Richmond, Virginia 23234
(804) 271-9315

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No. 01-1053

KELVIN J. HURDLE,

Plaintiff - Appellant

Versus

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF ENVIRONMENTAL QUALITY
Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert E. Payne, District Judge.
(CA-00-336)

Submitted: June 29, 2001
Decided: July 16, 2001
[Entered: July 16, 2001]

Before LUTTIG, MICHEAL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Kelvin J. Hurdle, Appellant Pro Se. Martha Murphey Parrish, Assistant Attorney General, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).3

PER CURIAM:

Kelvin J. Hurdle seeks to appeal the district court's order granting summary judgement against him on his Title VII claims. See 42 U. S. C. A. § 2000e to 2000e-17 (West 1994 & Supp. 2000). We have reviewed the record, the district court's opinion, and the materials submitted by the parties and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Hurdle v. Virginia, No. CA-00-336 (E. D. Va. Jan.5, 2001). We deny Hurdle's motion for appointment of counsel and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

August 30, 2001

MANDATE
[Entered: August 30, 2001]

TO: Clerk, District Court

FROM: Z. Yevone Jeffreys
Deputy Clerk

RE: 01-1053 Hurdle v. Commonwealth of VA
CA-00-336

HEREWITH IS THE MANDATE OF THIS COURT, ISSUED THIS DATE, ON THE JUDGMENT ENTERED BY THE COURT ON 7/16/01.

[ ]Order and Certified Copy of Judgment
[X]Opinion and Certified Copy of Judgment
[ ]Order on Costs
[ ]Other: _____
[ ]The record has been retained for us in case number _____

A copy of the judgment is enclosed to counsel/pro se parties.

cc: Kelvin J. Hurdle, Martha Murphey Parrish

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KELVIN J. HURDLE

Plaintiff,

v. CIVIL Action No. 3:00cv336

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

ORDER
[Entered January 5, 2001]

For the reason set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that the defendant's motion for summary judgment is granted and this action is dismissed with prejudice.

The Clerk is directed to send a copy of this Order to all counsel of counsel of record.

It is so ORDERED.

Robert E. Payne
United States District Judge

Richmond, Virginia
Date: January 5, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KELVIN J. HURDLE
Plaintiff,

v. CIVIL Action No. 3:00cv336

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant.

MEMORANDUM OPINION
[Entered: January 5, 2001]

Kelvin Hurdle filed this action on May 26, 2000, alleging racial discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. The Complaint names Hurdle's employer, the Commonwealth of Virginia Department of Environmental Quality ("DEQ"), as the defendant, and asserts that DDEQ violated Title VII by: (1) subjecting Hurdle to disparate treatment based on race: (2) subjecting him to a racially hostile work environment; and (3) retaliating against him for exercising his rights under Title VII. Hurdle seeks injunctive and declaratory relief, compensatory and punitive damages, and attorney's fees.

The DEQ has moved for summary judgment on all of Hurdle's claims. For the reasons that follow the motion for summary judgement is granted.

STATEMENT OF FACTS

Hurdle is an African- American male. He has been employed by DEQ since 1988, when he was hired as a Geologist. He was promoted in 1989 to the position of Geologist C, then again in 1996 to the position of Training

and Development Manager ("TD Manager"). In November 1998, during a reorganization of the DEQ, Hurdle was reassigned to the position of Environmental Engineer Senior. It is this employment action that triggered Hurdle's various race discrimination claims.

A. Alleged Disparate Treatment

Hurdle's disparate treatment claim is a composite of three different kinds of treatment which neither single nor collectively amounts to a valid claim of disparate racial treatment. The facts, which comprise these claims are set forth below.

1. Job Reassignment

Hurdle's position of TD Manager was abolished during a reorganization at the DEQ. The duties of the position were incorporated into the job description of another DEQ employee, Joe Shelton, a white male who, during the reorganization, was reassigned fr0m Director of Human Resources to Environmental Quality Assistant Division Director. At the same time, Hurdle was reassigned to Environmental Engineer Senior in the DEQ Office of Waste Permitting. The DEQ official in charge of the reassignment was John Cunningham, DEQ's Director of Administration, who is a black male. Hurdle experienced no reduction in pay as a result of the reassignment. However, as a result of the reassignment, Hurdle was moved from a grade 14 position to a grade 13 position. Hurdle duties as Environmental Engineer involve providing technical assistance to solid waste disposal facilities, including reviewing their annual reports, drafting permit amendments, and evaluating various groundwater monitoring systems. Upon reassignment, Hurdle came under the supervision of Howard Freeland, a white male who is an Environmental Engineer Consultant in the Office of Waste Permitting.

2. Deficient Training, Supervisory Support, and Access to Tools of Job

Hurdle blames Freeland for having failed to train and support Hurdle on his new job. In that respect, Hurdle asserts that: (a) Freeland failed to train Hurdle for his duties in the drafting of permit amendments: (b) Hurdle was given a regular workload within two months of reassignment whereas his white colleagues received small workloads for their first eight months; (c) Freeland did not make himself accessible to Hurdle for general supervisory support during the first three to four months after his reassignment whereas, in contrast, Freeland was allegedly very accessible to Hurdle's white co-workers; and (d) he was denied access to a computer database that would have assisted him in the performance of his duties. DEQ has refuted each of these assertions by affidavit and by deposition excerpts. As to the alleged dearth of training, Freeland states that he provided Hurdle with informal training on permit amendments beginning in December 1998 (one month after Hurdle's reassignment). According to Freeland, Hurdle actually received more training than other new employees did. Leslie Romanchik, a white female who is the Director of the Office of Waste Permitting and Howard Foreland's supervisor, swears that Hurdle was "trained in the same manner as all other DEQ waste permit writers." In response to Hurdle's allegation about disparities in initial workload, Romanchik avers that Freeland gave Hurdle assignments just as he did with Hurdle's co-workers. As for the alleged disparities in Freeland's accessibility, Freeland says that he "spent, at least, and equal amount of time answering [Hurdle's] questions and probably more time than I spend with the others in my section." Freeland also states that he has no recollection that Hurdle was unable to access the computer database.

3. Refusal to Confer Certain Employment Benefits– Compensatory Time

Hurdle contends that Freeland refused to grant him compensatory time for overtime hours while Freeland granted compensatory time to one of Hurdle's white co-workers. However, Hurdle basis allegations on statements made to him by two co-workers that receive the compensatory time for doing regular work. The DEQ has shown otherwise.

According to DEQ policy, compensatory time is granted only to employees who obtain prior permission and who work overtime doing out-of-the- ordinary tasks such as attending public meetings or completing field work. Overtime hours spent doing "regular work such as reviewing annual reports" do not entitle an employee to compensatory time under DEQ policy.

B. Alleged Hostile Work Environment

In support of his claim of a hostile work environment, Hurdle sets forth a compilation of all of the facts asserted in support of this lawsuit. Rather than list each fact here, all of the facts listed in Section A, infra, and Section C, supra, are incorporated. Not mentioned in either Section A or Section C are the additional allegations:

1. DEQ employees made racist or allegedly racist comments to Hurdle, in particular: (a) In June 1998, Carol Harris, a white female DEQ employee, who was not involved in any personnel actions involving Hurdle, called Hurdle "boy;" (b) Freeland made several allegedly derogatory comments including, "I'm going to whip you into shape;" "You don't have commonsense; you are not professional;" "You have a warped mind," none of which appear to be based on Hurdle's race.

2. Hurdle allegedly received reprimands for workplace conduct for which white employees were not reprimanded. Specifically, Hurdle says that Freeland reprimanded him for receiving a personal facsimile in the office and for arriving late to work

3. "Nearly all of Foreland's verbal communications with [Hurdle] were done in a malicious and condescending manner. [Hurdle] constantly had to ask Freeland to calm down when he interacted with [Hurdle]."

C. Alleged Retaliation

Hurdle filed a discrimination claim with the EEO of the Virginia Department of Personnel and Training on August 26, 1999. Apparently, Hurdle filed this claim because of his dissatisfaction with an "interim evaluation" completed by Freeland and Romanchik during the summer of 1999. The interim evaluation graded Hurdle as "does not meet expectation." Hurdle claims that, subsequent to August 26, 1999,. Freeland took adverse actions against him in retaliation for the EEO claim.

On September 23, 1999, Freeland completed Hurdle's annual performance evaluation grading him as "fair but needs improvement' which made Hurdle ineligible for a performance-based salary increase for the year. After a discussion with Hurdle, Freeland raised the ratings on several elements of the evaluation, but the overall evaluation grade was unchanged. Hurdle appealed the evaluation to Romanchik who changed two elements, but left the overall grade at "fair but needs improvement." Hurdle next appealed to Dennis Treacy, who upheld Romanchik's evaluation. Finally, Hurdle appealed to Hassan Vakili, Environmental Manager II, who is an Iranian-born U.S. citizen.

Vakili states that he made this change after hearing Hurdle express concerns that his supervisors were "trying to get rid of him." Vakili consulted with his supervisor, David Paylor, and they decided to give Hurdle the relief he sought as a good faith gesture.

On September 12, 2000, Freeland completed Hurdle's second annual performance evaluation as an Environmental Engineer II. The grade on this evaluation was "does not meet expectations." (This grade is lower than "faire but needs improvement.") Leslie Romanchik has reviewed this evaluation and agreed with it.

As further support for his retaliation claim, Hurdle alleges that, during the review of his 1999 performance evaluation, he told David Paylor that he had been subjected to discrimination. Hurdle alleges that Paylor directed Hurdle not to tell anyone else about his accusations of discrimination. But, as Hurdle also asserts, Paylor actually said "Well, file your charge, play your hand, do what you got to do to prove that discrimination has occurred. I will not have you going around telling people that you have been discriminated against". Finally, on both May 31, 2000 and June 26, 2000, Freeland, Romanchik, and DEQ human resources employee, Peggy Hawkins, met with Hurdle to discuss his 1999 performance evaluation and strategies for improving performance in the upcoming year. They wrote a counseling memorandum to document the meeting. At these meetings, Hurdle was assigned a mentor, Larry Syverson. Hurdle asserts that these meetings "were not held in good faith, but in direct response to the law suit."

DISCUSSION

Federal Rule of Civil Procedure 56 provides that summary judgment is to be rendered "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to the material fact and that the moving party is entitled to judgment as a matter of F.R.Civ.P56. The

mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is only that there be no genuine issue of material fact. *Jackson* v. *School Bd. of the City of Richmond*, 2000 U.S. Sist. LEXIS4474, *9 (E.D.Va. March 15, 2000) (Memorandum Opinion).

The evidence of the non-moving party must be believed and all favorable inferences are to be drawned in the party's favor. *Anderson* v. *Lobby, Inc.*, 477 U.S. 242, 255 (1986). The court cannot make credibility determinations or weigh the evidence. *Reeves* v. *Sanderson Plumbing Prods.* 530 U.S. 133, 120 S. Ct. 2097, 2110 (2000) (citing *Lytle* v. *Household Mfg., Inc.*, 494 U.S.545, 554-55 (1990)). Therefore, summary judgment is only appropriate it, after considering the record in its entirety, not rational finder of fact could find for the non-moving party. Jackson, 2000 U. S. Dist. LEXIS 4474 at *12. When a careful consideration of the record reveals the absence of any genuine issue of material fact, it is "the affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial." *Felty* v. *Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) See Jackson, 2000 U.S. Dist. LEXIS 4474, at*12.

A. Disparate Treatment Claims

1. Demotion Claim

a. Timeliness of Claim

As Hurdle's counsel correctly conceded at oral argument, the discriminatory demotion claim is time-barred. A Title VII claimant must file a complaint with the EEOC within 300 days of the allegedly discriminatory action otherwise the action is time barred. 42 U.S.C. § 2000e-5 (e). *Saleh* v. *Virginia State University*, No. 3:97cv460, at 22 (E.D. Va. Feb. 25, 1999) (unpublished). Hurdle filed his EEOC claim on February 9, 2000. Three hundred days before February 9, 2000 was April 14, 1999. Thus to survive the

300-day deadline, any discriminatory acts must have occurred subsequent to April 14, 1999. Hurdle's demotion occurred in November 1998, six months before April 14, 1999. Thus, his claim that the demotion was a violation of Title VII is available only if the demotion may be characterized as a "continuing violation" "Characterization of events as 'continuing violations' is permissible only when the alleged incidents of discrimination constitute a 'series of separate by related acts such that the are manifested in a continuing violation.' " Saleh at 23 (citations omitted). "Furthermore, there must be a 'present violation' within the statutory period." Id. at 23-24 (citations omitted). "When these factors are met, a plaintiff alleging unlawful discrimination may seek redress for events occurring outside the applicable limitation period." Id. at 24.

In assessing the applicability of the continuing violation doctrine to alleged discriminatory acts, it is appropriate to apply the set forth by the Fifth Circuit in *Berry* v *Board of Supervisors of LSU*, 715 F.2d 971 (4th Cir. 1983), there being no controlling decision on the issue in our circuit. 1 Saleh at 25-27.

> The Berry test calls for examination of three non-exhaustive factors: 'The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The Second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence which should trigger an employee's awareness of and duty to assert his or here rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?'

Saleh at 25-2 (quoting Berry at 981). To show that the demotion was part of a "continuing violation" under the first two Berry factors, Hurdle must establish that the demotion was "so connected topically and temporally as to permit an inference: that it was continuous with the allegedly discriminatory conduct that occurred after April 14, 1999. To satisfy the third, and most important, Berry factor, Hurdle must show that the demotion was of such a nature that it did not put Hurdle on notice of the DEQ's discriminatory intent, thus making it reasonable that he did not bring his claim sooner.[1] See *Emmert* v. *Runyon*, 178 F, 3d 1283 (4th Cir. 2000), 1999WL 253632 **4 (4th Cir., Md.).

The demotion occurred in November 1998. John Cunningham, DEQ Directory of Administration, made the decision to reassign Hurdle. Each of Hurdle's additional allegations of discrimination, however, are attributed to Howard Freeland. Thus, the demotion claim is distinct from, and unrelated to, the remaining claims in that the demotion was effectuated by a different actor. Thus, Hurdle fails to meet the first Berry prong, relatedness of subject matter.

In addition, Hurdle does not meet the third part of the Berry test, permanence. It is undisputed that he disagreed with the reassignment from the outset. Indeed, he signed the October 1998 "Notice of Layoff or Reassignment" "under duress." Hurdles own contemporaneous response to the reassignment indicates that he was on notice of what he perceived to be the DEQ's discriminatory intent. Additionally, the permanence of a job reassignment (as compared to a one-time reprimand or refusal to grant one request for compensatory time) is the sort of permanence which should trigger an employee's awareness of and duty to assert his or her rights." Berry at 981.

Accordingly, even if the November 1998 demotion was discriminatory, it was not part of a continuing violation and is therefore time-barred. As a result, the defendant's Motion for Summary Judgement is granted with respect to Hurdle's claim of discriminatory reassignment.

2. Deficient Training, Supervisory Support, and Access to Tools of Job

" Am plaintiff may satisfy his burden on summary judgment by offering 'direct evidence of a purpose to discriminate or circumstantial evidence of sufficiently probative force to raise a genuine issue of material fact' that the plaintiff's protected trait was the reason for the employment action." Saleh at 34 (quoting Evans v Technologies Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996)). " If 'direct evidence' is lacking or insufficient, a plaintiff must proceed pursuant to the three-part framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 892 (1973." Id. McDonnell Douglas Corp establishes a framework of shifting burdens of production wherein (1) the plaintiff must establish a prima facie case of discriminatory intent on the part of the defendant; (2) the defendant may then rebut the presumption raised by the prima facie case by establishing that it had a "legitimate, non-discriminatory reason" for the employment action; and (3) the plaintiff then has the opportunity to show that the reason proffered by the defendant was actually a "pretext" for discrimination. McDonnell Douglas, 411 U.S. at 807.
In order to establish a prima facie case of discrimination under the McDonnell Douglas formulation, Hurdle must show that: (1) he is a member of a protected group; (2) he suffered some adverse employment action; (3) at the time of the adverse employment action, he was performing at a level that met his employer's legitimate expectation; and (4) the adverse employment action occurred under circumstances that raise an inference of unlawful discrimination. See St Mary's Honor Ctr. v Hicks, 509 U. S. 502, 506 (1993). 13

Genuine issue of material fact' that the plaintiff's protected trait was the reason for the employment action." Saleh at 34(quoting Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996)). "If direct evidence' is lacking or insufficient, a plaintiff must proceed

pursuant to the three-part framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 892 (1973)." Id. McDonnell Douglas establishes a framework of shifting burdens of production wherein (1) the plaintiff must establish a prima facie case of discriminatory intent on the part of the defendant; (2) the defendant may then rebut the presumption raised by the prima facie case by establishing that it had a "legitimate, non-discriminatory reason" for the employment action; and (3) the plaintiff then has the opportunity to show that 14.Hurdle claims to have suffered disparate treatment based o race in the following forms: (a) Freeland's failure to train Hurdle for the position of Environmental Engineer II; (b) Hurdle's large initial workload in that position as compared to the workload of white employees; (c) Freeland's comparative inaccessibility to Hurdle; and (d) Freeland's denial of Hurdle's request for access to a necessary computer database.

Hurdle meets part one of the prima facie showing, membership in a protected class. Also, there remain disputes whether Hurdle actually suffered adverse employment actions and whether he was meeting his employer's expectations at the time. Hence, for purposes of this motion, Hurdle has satisfied the second and third components of a prima facie case.

However, Hurdle has offered no evidence which would raise a genuine issue that the adverse employment actions, of which he complains, occurred under circumstances that raise an inference of unlawful discrimination. The inability to satisfy the fourth facet of the prima facie case is, of course, fatal to the continuation of this action.

To raise an inference of discrimination, Hurdle must offer some evidence from which a reasonable jury could conclude that race played a role in Freeland's actions toward Hurdle. "Disparate treatment claim cannot succeed unless the employee's protect trait actually played a role" in the employer's decision-making process. Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993). Hurdle could raise the

inference tat Freeland's actions were based on race by; for example, setting for the facts that show that Freeland treated Hurdle differently form similarly-situated white employees. See e. g. Adams v. Hernderson, 1998 U.S. App. Lexis 31688, * 4 (4th Cir.1998) (per curium) (unpublished) (requiring the plaintiff to show that he engaged in conduct similar to white employees by that disciplinary measures enforced against him were more severe that those enforced against white employees).

Hurdle has offered not facts sufficient to meet the fourth prong of the prima facie case His only support for his allegation that Freeland's actions were racially-motivated comes in the form of his own conclusory statements in his affidavit and his own deposition testimony. For example, in his Memorandum in Opposition to Defendant's Motion for Summary Judgment, Hurdle states that: Hurdle, unlike Bernard and Syverson, both of whom are white, was not given permit amendment training for more than a year after he joined Freeland's unit. Bernard and another white permit writer, Jeff Christie, were given this training immediately upon their assignment to the unit. Moreover, their permit amendment assignments gave them overtime opportunities, which Freeland denied to Hurdle. Id. at ¤ 6. This recitation includes no citation to any sworn statement or deposition. And, the Court's review of the evidence reveals nothing to support these conclusory allegations.

In the absence of any genuine issue of material fact as to a racial motivation underlying Freeland's allegedly discriminatory actions, Hurdle fails to establish a prima facie case of race discrimination based on deficient training, disproportional workload, supervisory support, or access to the computer database. Thus, notwithstanding the possible presence of disputes about whether the so alleged adverse employment actions occurred at all and about Hurdle's performance on the job, the complete absence of any evidence that Hurdle experienced treatment based on race makes summary judgment appropriate since "the record, taken as a whole could not lead a rational trier of fact to find

for the non-moving party." Keegan v. Dalton, 899 F Supp. 1503, 1512 (1995) (quoting) United States v. Lee, 943 F. 2d 366, 368 (4th Cir. 1991)).

3. Refusal to Confer Certain Employment Benefits Compensatory Time

Hurdle's next disparate treatment claim arises from his allegation that Freeland "allows white male counterparts to work for overtime pay in order to complete projects. Yet plaintiff's requests for compensation time for overtime hours already worked and was [sic] routinely denied." Complaint Para. 5.

To establish a prima facie case of discrimination in the granting of compensatory time, Hurdle must establish that: (1) he is member of a protected class; (2)"[he] was entitled to the desired benefit; (3) the [DEQ] denied [him] this benefit; and (4) unprotected employees were granted the benefit." Keegan v. Dalton, 899 F. Supp. 1503, 1513 (E.D. Va. 1995) (Memorandum Opinion) (applying the McDonnell Douglass framework to plaintiff's allegation that she was denied an employment benefit, namely long-term training, based on gender). In Keegan, the court held that the plaintiff had failed to establish the second prong, entitlement to the benefit, by assessing the employer's policy regarding which employees could be awarded long-term training and concluding that the policy had been correctly applied in the decision to deny Keegan's application for such training. Id.

Hurdle has raised no genuine issue about whether he was entitled to compensatory time. His argument on this issue rests entirely on his unsubstantiated belief that two white co-workers received compensatory time for overtime hours spent doing their "regular" work. However, the DEQ's policy regarding compensatory time, and an exhibit identifying which employees received compensatory time for which job activities, show conclusively that DEQ employees may receive compensatory time only with the

permission of their supervisor and only for hours spent doing work that is outside of their usual day-to- day responsibilities. Nor has Hurdle shown that any white employee was awarded compensatory time for performing regular duties. (2)

Hurdle claims entitlement to compensatory time for overtime hours spent working on annual reports, and undisputed component of his regular job duties. He does not claim to have been engaged in the sort of out -of- the-ordinary work, which the compensatory time policy contemplates. He offers no evidence, which raises a genuine issue as to his entitlement to this benefit. He thus fails to establish a prima facie case of discrimination with respect to their award of compensatory time; and summary judgment in favor of the DEQ is warranted in this aspect of Hurdle's claim.

B. Hostile Work Environment Claim

As support for his claim that he was subject4ed to a hostile work environment based on race, Hurdle sets forth the entire collection of facts alleged in his lawsuit. To prevail on a hostile work environment claim, Hurdle must establish that he defendant engaged in conduct that is "sufficiently severe or pervasive to alter the conditions of a victim's employment and create and abusive work environment" based on the protected trait. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (19930. And, as explained above, Hurdle must show that the "severe and pervasive" conduct was racial in nature. Id., see also Hawkins v. Pepsico, Inc., 203 F. 3d 274, 281 (4th Cir. 2000).

In a case whose facts resemble clearly those presented here, the United States Court of Appeals for the Fourth Circuit recently emphasized that the "[l]aw does not blindly ascribe to race all personal conflicts between individuals of different races . . .. (2) In his deposition, Hurdle stated that he observed a co-worker, Larry Syverson, filling out a form requesting compensatory time for

overtime hours spent doing "regular" work, and that another co-worker, Shawn Davis, told him that compensatory time is available for "regular work. Hurdle Depo. At 92-96. Given the DEQ's policy and the affirmative showing by the DEQ that no white employee was given compensatory time for performing regular duties, this hearsay evidence of Hurdle is insufficient to create a dispute of fact.

Instead, legally sufficient evidence is required to transform an ordinary conflict [between employee and employer] into an actionable claim of discrimination. " Hawkins at 282. In Hawkins, the Fourth Circuit affirmed summary judgment in a hostile work environment claim asserted by an African-American employee based on the conduct of her white supervisor. Id. at 276. Hawkins alleged that: (1) her supervisor failed to adequately inform her of her responsibilities and aver her inadequate instructions; (2) her supervisor failed to acknowledge Hawkins' input and criticized her unfairly; (3) her supervisor told her that Hawkins was not of the caliber" to be a manager; and (4) her supervisor made inaccurate assessments in Hawkins'' evaluation. Id. at 277. Hawkins contextualized all of these allegations with a claim that her supervisor's conduct toward her was in marked contrast to the supervisor's conduct to white employees. Id. In addition, Hawkins claimed that the supervisor demonstrated similar conduct toward Hawkins' sole African -American co-worker. Id.

In affirming the district court's grant of summary judgment in favor of Hawkins' employer, the Fourth Circuit found that Hawkins had not shown that the problems "were racial in nature," Id. at 281, explaining that Hawkins' Complaints about [her supervisor's] management style toward her are without a hint of racial significance. Even if [the supervisor harbored some personal dislike of Hawkins that made Hawkin's job more difficult or stressful, 'an employer is not required to like his employees' . . .. And it is for PepsiCo, not the courts, to rule on the wisdom and

generosity of [the supervisor's] management practices. Thus, in the absence of sufficient evidence of racial harassment, the district court correctly dismissed Hawkins' claim. Id.

Hurdle's attempt to link Freeland's behavior to race consist of the following allegations: (1) Carroll Harris, a white DEQ employee, called Hurdle "boy" during a conversation in June 1998 and (2) Freeland's conduct toward Hurdle was different from his conduct toward white employees. First, Hurdle makes no showing that links racist speech by Harris to Freeland's conduct toward Hurdle, nor to any other fact included in Hurdle's hostile work environment claim. Second, as the Fourth Circuit explained in Hawkins, the plaintiff's conclusory statements regarding a racebased differential in treatment are insufficient to establish a prima facie case of hostile environment based on race. Even Hurdle's allegations regarding specific comments made by Freeland miss the mark of discrimination based on race. None of the statements which Hurdle attributes to Freeland, i.e."I'm going to whip you into shape; "you don't have commonsense; you are not professional!" "You have a warped mind," reflects any racial animus. Nor does Hurdle's allegation that Freeland's communications with him were generally "malicious and condescending" indicate racial animus.

In light of Hurdle's failure to raise a genuine issue of fact as to a racially-motivated hostile work environment, summary judgment against him on this claim is appropriate

B. Retaliation Claim

Hurdle claims that he suffered retaliation for having exercised his rights under Title VII. Section 704(a) of Title VII, 42 U.S.C. § 2000e-3 (a) provides in part: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has . . . made a charge, testified, assisted, or participated in any manner n an investigation, proceeding,

or hearing under this title." The McDonnell Douglas framework applies to retaliation claims. Karpel v. Inova Health Sys. Serv., 134 Fl #d 1222, 1228 94th Cir. 1998). To establish a prima facie case of retaliation, Hurdle must demonstrate that: (1) he engaged in protected activity; (2) DEQ took adverse action; and (3) there was a causal connection between the protected activity and the adverse action. Id. The third

The third component is the most difficult one to assess, but it is crucial to the establishment of a prima facie case. If Hurdle establishes a prima facie case, the burden shifts to the DEQ to demonstrate a legitimate, non-discriminatory reason for the adverse action, Karpel at 1229. Finally, Hurdle can show that the DEQ's proffered reason is pretextual. Id.

As the plaintiff's counsel correctly conceded at oral argument, Hurdle fails to establish a prima facie case of retaliation.

1. Protected Activity

Hurdle's August 1999 claim filed with the EEO of the Virginia Department of Personnel and Training was a protected activity satisfying the first part of the test.

2. Adverse Employment Action

The Fourth Circuit has not yet adopted a standard for assessing whether an employment decision is an "adverse employment action" for the purposes of a Title VII retaliation claim. Smith v. First Union National Bank, 202 F.3d 234 n. 11 (4th Cir. 2000) (declining to adopt a standard). Other circuits are split over the issue whether an employment decision must be an "ultimate employment decision" in order to be considered and "adverse employment decision" for the purposes of a retaliation claim, Id. However, even under the most liberal standard, one which does not require that an employment decision be

classifiable as "ultimate", Hurdle fails to establish any adverse employment action for a simple reason: none of the actions he sets forth can be characterized as materially adverse. In order to be an adverse employment action, an action must be a "material [[adverse change in the terms and conditions of employment [and] must be more disruptive than a mere inconvenience or an alteration of job responsibilities." Harris v. General Motors Powertrain, 1999 U.S. 1999 U.S. App. LEXIS 309, * 10 (4th Cir. 1999) (unpublished) (quoting Crady v. Liberty Nat'l Bank & Trust Co., 99 F. 2d 132, 136 (7th Cir. 1993). Hurdle asserts that the following actions constitute adverse employment actions: (1) the September 23, 1999 performance evaluation which rated him as "fair but needs improvement" and was then upgraded to "meets expectations;" (2) the September 12, 2000 performance evaluation which rated him as "does not meet expectations:" (3) David Paylor's alleged admonition of Hurdle not to talk about his feelings of being discriminated against, and (4) the May 31, 2000 and June 26, 2000 strategy meeting with Freeland, Romanchik, and Hawkins. Neither Paylor's alleged threat, nor the May and June 2000 meetings were "changes" in the terms and conditions of employment." Further, the question regarding whether the 2000 performance evaluation was retaliatory is not properly before this court at this time because it was not included in the plaintiff's EEOC claim. Finally, the 1999 performance evaluation is not an adverse employment action because the rating of "meets expectations" had no materially adverse impact on the terms and conditions of Hurdle's employment. To the contrary, the "meets expectation" rating entitled Hurdle to a merit raise for that year.

3. Causation

Even if the 1999 performance evaluation somehow were to meet the "adverse employment action" component of the prima Facie case, Hurdle fails to establish the crucial third part, causation, Factors which the Fourth Circuit has considered in determining whether adverse employment actions were caused by an employee's protected activity include: (1) the temporal relationship between the protected activity and the adverse action: (2) whether the relevant decision-maker who effectuated the adverse action was aware that the employee had engaged in protected activity; and (3) whether similar adverse actions had occurred prior to the protected activity. See Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656-58 (4th Cir. 1998).

Supporting a finding of causation in this case is the undisputed fact that there is a temporal relationship between the protected activity and the evaluation: the 1999 performance evaluation was completed on month after Hurdle's August 1999 protected activity. Mitigation against a finding of causation however, is the undisputed fact that on July 16, 1999, Freeland completed and "interim evaluation" of Hurdle in which he rated Hurdle's performance and "does not meet expectations." This evaluation, completed before the protected activity, reflects and overall consistency in Freeland's assessment of Hurdle and weakens any inference of retaliation that may be drawn from the evaluation completed subsequent to the protected activity.

The temporal relationship between the protected activity and the adverse action is not enough to establish causation, see Dowe at 657, rather, there must be evidence that the relevant decision maker was aware of the protected activity, id. Hurdle has failed to raise a genuine issue of material fact as to the question of Freeland's knowledge of Hurdle's EEO claim. The absence of evidence of Freeland's knowledge, combined with the consistency in Freeland's

evaluation of Hurdle both before and after the protected activity, supports the conclusion that no "reasonable jury could return a verdict" for Hurdle. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 248 (1986). Thus, DEQ us entitled to summary judgment in Hurdle's retaliation claim.

CONCLUSION

For the foregoing reasons the defendant's Motion for Summary Judgment is granted as to all of the plaintiff's claims, i.e, (1) discriminatory demotion; (2) discriminatory failure to provide training, supervision, and support; (3) refusal to grant compensatory time; (4) hostile work environment; and (5) retaliation.

The demotion claim fails because it is time-barred. The claim of discriminatory failure to provide training, supervision, and support fails because of the plaintiff's failure to raise any genuine issue as to racial motivation. The compensatory time claim fails because of the plaintiff's failure to raise any genuine issue as to his entitlement to compensatory time. The hostile work environment claim fails because of the plaintiff's failure to raise any genuine issue as to racial motivation, And, finally, the retaliation claim fails because the plaintiff establishes neither knowledge of protected activity on the part of his supervisor nor a change in his supervisor's assessments caused by the protected activity. The action, therefore, will be dismissed with prejudice. The Clerk is directed to send a coy of this Memorandum Opinion to all counsel of record.

It is so ORDERED

Robert E. Payne
United States District Judge

Richmond, Virginia
Date: January 5, 2001

UNITED STATES COURT OF APPEALS

FOR THE FORTH CIRCUIT

FILED
August 22, 2001
[Entered: August 22, 2001]

No. 01-1053
CA–00-336

KELVIN J. HURDLE

Plaintiff - Appellant
v.

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF ENVIRONMENTAL QUALITY

Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Kelvin J. Hurdle,
Plaintiff

Civil Action No. 3:00CV336

v.

VIRGINIA DEPARTMENT OF
ENVIRONMENTAL QUALITY,
Defendant.

ORDER
[Entered: April 25, 2001]

Having reviewed the Motion to Alter or Amend Judgement and submit "newly discovered evidence" that was mistakenly omitted on February 2, 2001 (Pleading No. 35) filed on February 22, 2001 and the Motion to Alter or Amend Judgement and submit additional "newly discovered evidence" (Pleading No. 36) filed on March 2. 2001 and the response brief and the reply brief; and it appearing that motions were filed beyond the time limit set by Fed. R. Civ. P. 59; and that the standards for newly discovered evidence relief have not been met; and it further appearing that the action is now on appeal to the United States Court of Appeals for the Fourth Circuit, it is hereby ORDERED that the Motion to Alter or Amend Judgement and submit "newly discovered evidence" that was mistakenly omitted on February 2, 2001 (Pleading No. 35) and the Motion to alter or Amend Judgement and submit additional "newly discovered evidence" (Pleading No. 35) are denied.

The Clerk is directed to send a copy of this Order to the plaintiff and to counsel of record.

It is so ORDERED.

Robert E. Payne
United States District Judge

Richmond, Virginia
Date: 25 APR 2001

IN THE UNITED STATES DISTRCT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Kelvin J. Hurdle,
Plaintiff

v. Civil Action No. 3:00CV336

VIRGINIA DEPARTMENT OF
ENVIRONMENTAL QUALITY,
Defendant.

ORDER
[Entered November 8, 2000]

It is hereby ORDERED that the defendant's Motion in Limine to Strike Expert Witness is denied as moot because of the forthcoming decision on the defendant's motion for summary judgment.

The Clerk is directed to send a copy of this Order to the plaintiff and to counsel of record.

It is so ORDERED.

Robert E. Payne
United States District Judge
Richmond, Virginia
Date: November 8, 2000

Supreme Court, U.S.
FILED
FEB 14
CLERK

No. 01-760

In The

Supreme Court of the United States

KELVIN J. HURDLE,

Petitioner,

v.

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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28 pp

QUESTIONS PRESENTED

I. Is the Time-barred 1998 Demotion Unrelated to the Disparate Treatment Allegations and thus, not Revived under the Continuing Violation Doctrine?

II. Whether an Affirmance of the Award of Summary Judgment for the Employer is Mandated given the Appellant's Lack of Proof Supporting any Intent to Discriminate on the Basis of Race?

III. Do the Undisputed Facts Fail to Establish a Racially Hostile Environment Claim as a Matter of Law?

IV. Does the Undisputed Fact that the Negative Evaluations Began Before the Protected Activity Occurred Cut the Causal Connection Required for a Prima Facie Claim of Retaliation?

V. Are the Due Process Claims Foreclosed by Plaintiff's Failure to Name a Proper Party Defendant?

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STATEMENT OF FACTS

Kelvin J. Hurdle ("Hurdle" or "Petitioner"), an African-American male and former employee of the Virginia Department of Environmental Quality ("DEQ"), brings this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981 for damages caused by DEQ's allegedly unlawful employment practices. Specifically, he alleges in his Complaint that the agency demoted him in 1998 from a Training Manager position because of his race and that his duties were assigned to a white male. He also asserts that once demoted to an Environmental Engineer Senior position, he was subjected to disparate treatment because of his race. Among the disparate treatment allegations lodged against his supervisor was a practice of approving extra pay for white counterparts to complete projects while he was routinely denied such pay. Hurdle alleges that his supervisor treated him with malice and condescension, citing derogatory and "racially foul" comments. He also alleges that he was denied access to a computer disc, which was made available to white co-workers. This coupled with "fraudulent" performance ratings allegedly created a hostile work environment. He asserts that the erroneous ratings were retaliatory for discussing Title VII issues with an investigative state agency, a protected activity. Hurdle seeks declaratory and injunctive relief, as well as compensatory and punitive damages and attorney's fees.

As required in Rule 15.2 of the Rules of this Court, DEQ first responds to the Petitioner's Statement of the Case, which contains several misstatements of the facts contained in the district court's record. Respondent

respectfully asks that this Court consider, instead, the exhaustive summary of undisputed facts in the district court's opinion. *See* pages 5-10 of the Appendix ("App.") attached to the Petition. The district court's summary reflects that Hurdle's response to DEQ's Motion for Summary Judgment (and its eleven detailed Enclosures ("Encl."), Affidavits ("Aff's"), Exhibits ("Exh") and deposition excerpts ("Depo. Tr.") added no additional detail to Hurdle's deposition testimony and interrogatory responses. Neither did his response contain any corroboration from co-workers, nor, despite his characterization, any material disputes. There was simply no evidence that anyone at DEQ treated Hurdle differently because of his race. Instead, it was crystal clear that four levels of DEQ management struggled to deal with his criticisms and dissatisfactions, as they gave him opportunity after opportunity to improve his performance.

Chief among the misstatements is the new assertion that David Paylor "motivated the continued discrimination" because of his role in the demotion of Hurdle from Training Manager to Environmental Engineer Senior and the improper classification of the Training Manager's position. This vague assertion of wrongdoing is a transparent attempt to overcome his attorney's concession and the district court's ruling that John Cunningham, the African American senior manager who demoted him, was not involved with his later allegations of disparate treatment and hostile environment. He hopes that this unsupported assertion of a role for David Paylor will negate the district court's ruling that the demotion was a separate act and, thus, is time barred.

Hurdle also misstates the factual findings with regard to the alleged disparate treatment he received while supervised by Howard Freeland. The district court considered the affidavits and documents submitted by the parties and concluded that the agency's policy for earning compensatory time was given only upon prior permission for out-of-the-ordinary tasks. *See* App. at 8. It is undisputed that in February, 2000, DEQ provided documentation to the investigating state agency that recorded to whom "comp time" was given and for what reasons, specifically listing Maria and Larry Syverson. Defendant's Encl. II, Freeland Aff., Exh. 3. The policy allowed it for those employees attending public meetings or doing field work, but not for regular work such as reviewing annual reports. Hurdle responded to DEQ's factual assertion that he was not entitled to this perceived benefit by relying on unsworn hearsay information attributed to a co-worker. At his deposition, however, Hurdle conceded that Maria Williams had earned more "comp time" because she went to more public meetings at night. Encl. I, Hurdle Depo. Tr., pp. 229-30. He also must concede that he, himself, has received compensatory time, but only for working on the deadline day for annual report submissions and for attending public meetings, both special exceptions to the general rule. Encl. II, Freeland Aff. 16. Thus, contrary to his bare assertion, Hurdle brought on no proof that his requests were routinely denied on the basis of his race.

Another aspect of his disparate treatment claim concerns an inexplicable allegation that DEQ intentionally denied him access to a computer disc that contained historical information helpful to the completion of his job

duties. As stated by the district court, DEQ refuted this allegation in Freeland's affidavit, who had no prior knowledge of this claim, but noted that the disc was available to all employees throughout Hurdle's time as a permit writer. In sum, the allegations of deficient training, disproportional workload, supervisory support and access to this database were characterized by the district court as workplace "disputes." The court, however, found "the complete absence of any evidence that Hurdle experienced treatment based on race." *See* App. at 7, 16.

Hurdle also misstates the facts with regard to the creation of a racially hostile environment, making reference to workers who witnessed hostile comments made to him by Freeland. Yet, again, he submitted no proof or statements that anyone witnessed any of these interchanges, or any other proof to support his subjective view that the comments were racially motivated.

With regard to Hurdle's statement of facts and argument supporting his retaliation claim, he suggests that his problems started when he complained to a state EEO office on August 26, 1999, and continued to December 3, 1999, when he attempted to discuss Title VII concerns. *See* Petition at 4-5, 18-19. In prior submissions, he linked retaliatory acts to the May 2000 filing of his lawsuit. He now suggests, and raises for the first time in this litigation, that DEQ's reluctance to talk to him about his Title VII concerns was also a denial of due process. The facts relevant to retaliation are, instead, those covered by the district court opinion at pages 9-10 of the App. The retaliation action rises and falls on the undisputed timing of his August 26, 1999, complaint to the Virginia Department of Personnel and Training's EEO Office, his July 16,

1999, interim evaluation and his 1999 annual evaluation dated September 23, 1999. Moreover, it is equally undisputed that none of these evaluations had any effect on his salary. *See* district court's opinion, App. at 22.

Respondent notes that the Petitioner's Appendix does not contain the Complaint or the briefs and enclosures submitted to the district court with DEQ's Motion for Summary Judgment, Hurdle's Reply Brief or DEQ's Rebuttal Brief. These are available to the Court in the fourth circuit's record in the event resolution of this Petition requires such a review or, alternatively, if deemed necessary for proper review, the Respondent respectfully offers to prepare a Supplemental Appendix.

REASONS FOR DENYING THE WRIT

DEQ restates the questions presented by this Petition in order to clarify the issues before this Court. As affirmed by the Fourth Circuit Court of Appeals, the district court appropriately awarded summary judgment in this case because no reasonable juror could find from the undisputed facts that Hurdle was the victim of Title VII disparate treatment, harassment from a racially hostile environment or retaliation.

Although determination of motive sometimes requires credibility determinations, this is not such a case. This record documents in voluminous detail (through sworn affidavits, deposition excerpts and documents) why Hurdle was reassigned and why his performance was failing. The employer has legitimate reasons for every action taken and none of them were proven false by

Hurdle. Supervisors Freeland and Syverson cannot be painted as the persons responsible for Hurdle's circumstances. John Cunningham, an African American, demoted and reassigned Hurdle. Hassan Vakili, an Indian by birth, counseled Hurdle and concluded that his dissatisfaction began when his previously lax work schedule was scrutinized and altered. Female supervisors, Leslie Romanchik and Karen Sismour, have approved every personnel action taken by Howard Freeland and Larry Syverson, white males. Cynthia Houchens, an African American female, complained to Freeland that Hurdle was altering correspondence tracking sheets and not responding to clients. Four levels of management approved every action taken and none of the personnel actions unlawfully affected the terms and conditions of his employment.

Summary judgment pursuant to Rule 56 of the Federal Rule of Civil Procedure is appropriate because this case presents a set of facts in which the plaintiff cannot prevail as a matter of law. *See Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 958-59 (4th Cir. 1996). Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Hurdle could not re-create issues of fact in his affidavit that were established by deposition. *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 975 (4th Cir. 1990) (no issue created simply because plaintiff advances conflicting versions). In addition, his counsel was not allowed at oral argument to argue points without factual support. *Azie v. BellSouth*

Adver. & Publ. Corp., 86 F. Supp. 2d 552, 556-57 (W.D. N.C. 2000), *citing Rountree v. Fairfax County School Bd.*, 933 F.2d 219, 223 (4th Cir. 1991).

A. Disparate Treatment

1. Demotion/Reassignment

Hurdle's first claim is that his November 1998 demotion/reassignment was motivated by racial animus. The district court, however, ruled that this claim was time barred by Title VII's limitations period, 42 U.S.C. § 2000e-5(e)(1). *See* the district court's analysis in the App. at pages 11-13, setting forth the 300-day filing requirement and the February 9, 2000, date of the EEOC charge at issue, which results in an April 14, 1999, cutoff for that charge. *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 440 (4th Cir. 1998); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

Appellant's counsel appropriately conceded this point at oral argument. The claim is not saved by the continuing violation doctrine because as the district court pointed out, all of the discriminatory acts within the covered time period are attributed to Howard Freeland, who had nothing to do with the demotion. The demotion decision was conducted by John Cunningham, DEQ's Director of Administration, a black male. Mr. Cunningham was not involved with the evaluation of Hurdle's 1998-1999 performance, which forms the basis of the timely allegations. Accordingly, the court's conclusion that the demotion is distinct from and unrelated to the remaining claims is supported both by the caselaw and these undisputed facts. *Emmert v. Runyon*, 178 F.3d 1283

(4th Cir. 1999); *Berry v. Bd. of Supervisors of L.S.U.*, 715 F.2d 971 (5th Cir. 1983) (application of continuing violation doctrine requires same type of subject matter, frequency or recurring nature of acts and a lack of permanence such that there is no awareness/no duty to report the initial untimely act). The district court's determination also is consistent with related caselaw establishing that a layoff from employment constitutes a completed act at the time it occurs. *Lawson v. Burlington Industries, Inc.*, 683 F.2d 862 (4th Cir.), *cert. denied*, 459 U.S. 944 (1982), *quoting Griffin v. Pacific Maritime Asso.*, 478 F.2d 1118 (9th Cir.), *cert. denied*, 414 U.S. 859 (1973).

As previously stated, Hurdle also raises new facts not established in the district court record regarding David Paylor's role in this decision. Just as he was foreclosed at the circuit level from arguing about Ms. Bobbie Hughes' role in his 1998 demotion/reassignment, which had not been raised at the trial level, so too must this new allegation be disregarded on appeal. Moreover, even if considered, these assertions against Paylor and Hughes have no bearing on the district court's decision on the timeliness issue. Like Mr. Cunningham, Ms. Hughes had no involvement in the performance issues. Mr. Paylor was involved but, ironically, it was he who ultimately raised the evaluation score in 1999. Nothing in the covered period relates back to the reassignment; there has been no related series of acts designed to get rid of Hurdle because of his race. There is no conspiracy pled and no conspiratorial acts taken.

Hurdle's proof also fails to establish this claim on the merits whether through direct evidence of discrimination or indirect evidence through the three-part framework

established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Hurdle's only possible argument of direct evidence is that John Cunningham, an African American, intentionally discriminated against him in the reassignment decision because Hurdle told Cunningham that Freeland was a racist and Cunningham would not believe him. Encl. I, Hurdle Depo. Tr. pp. 127-28. Plaintiff abandoned this assertion during district court briefing and Cunningham categorically denies it. Accepting it for argument's sake, it does not negate the agency's rationale for restructuring, or the stated reasons why Cunningham felt Hurdle would do well in waste permitting. Nothing in Joe Shelton's affidavit (submitted by Petitioner to the district court) proves those reasons to be false.

Hurdle principally relies on the inferential proof scheme of *McDonnell Douglas*, but failed to establish a *prima facie* showing of discrimination: that he (a) is a member of a protected class; (b) he suffered an adverse employment action; (c) at the time, he was performing at a level that met his employer's expectations; and (d) that his position remained open or was filled by a qualified person outside the protected class. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993); *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 455 (4th Cir. 1989).

Hurdle's personal opinion that he was treated unfairly because he was deemed by Cunningham as unqualified for a desired grade 14, engineer position in air monitoring, is not enough to establish a *prima facie* showing that Cunningham discriminated against him because of his race. *Yarnevic v. Brink's Inc.*, 102 F.3d 753, 757 (4th Cir. 1996) (mere conclusory allegations of motivation do not preclude summary judgment); *Evans v.*

Technologies Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996) (bald assertions on one's own qualifications do not negate employer's legitimate reasons) *citing Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988). "It is the perception of the decision-maker which is relevant"; the plaintiff's self-assessment does not control. *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980).

If the petitioner's proof of discrimination is evaluated as satisfying the *prima facie* showing requirements, the burden shifts to DEQ to establish legitimate reasons for the allegedly racist reassignment. Because both Paylor and Cunningham articulated legitimate reasons for the reassignment, in lieu of layoff, the burden of production shifts to Hurdle to prove that these proffered reasons are false. To maintain an inference of discrimination and avoid summary judgment, Hurdle must prove that DEQ's stated reasons are false. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false or unworthy of credence, may permit the trier of fact to conclude that the employer discriminated); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

All that Hurdle offers about Cunningham's rationale is that the circumstances are "peculiar and questionable" and "rather suspicious." Petition at 8, 10. He has no proof that he was singled out because of his race. Indeed, his own proof shows that Shelton was twice affected by the same reorganization. If Hurdle was demoted because he was black, then it must be equally true that Shelton was moved because he was white. Both inferences are illogical

and fly in the face of the stated reason that then DEQ Director Dennis Treacy chose to reorganize his administrative branch for reasons of programmatic and fiscal efficiency. Neither man was fired, neither man received a cut in salary. This is not discrimination based on race.

2. Deficient Training, Supervisory Support and Access to Tools of Job

In analyzing the four required factors for a *prima facie* case of disparate treatment, the district court noted Hurdle's membership in a protected class and also held that there were material disputes regarding whether he had suffered adverse employment actions and whether he was meeting his employer's expectations. App. at 15. The lower court, *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993), therefore, confined its analysis to the fourth factor: whether the undisputed facts, considered in the light most favorable to the plaintiff occurred under circumstances that raised an inference of discrimination. Finding that the facts Hurdle offered through unsworn, conclusory descriptions were insufficient, the district court determined this omission fatal to the continuation of his case.

Taking all of the complaints in Hurdle's response to Interrogatory no. 4, Petition at 13-17, we are left with anecdotal, uncorroborated evidence of poor rapport and unequal access to Freeland for adequate training. *See* Petition at 13-18. Giving Hurdle all fair inferences on this issue, the best evidence is that he felt during the first three to four months on the job that he did not have equal

access to Freeland and observed white employees with better rapport, i.e., Syverson, Bernard and Christie, in his view, got permit training early which enabled them to qualify for overtime opportunities. The description of the informal, on-the-job training for everyone in the waste permitting section, however, was unrebutted and the revision of Hurdle's 1999 performance evaluation for enhanced training and communication opportunities before passing judgment on Hurdle's performance is, likewise, undisputed.

Hurdle's subjective impressions of his lack of access to the tools of the job must be evaluated in light of Freeland's and Romanchik's efforts, which are substantiated by the undisputed June 9, 2000 counseling memo. Romanchik expresses the view that she does not know what else they could have done to help Hurdle. His work has been edited daily, he has had a mentor since June 2000, and DEQ paid for him to go to writing and communication classes at J.S. Reynolds again (following a 1994 course). Yet, he even blames the mentor for his continuing 2000 performance problems.

Nothing in his interrogatory response changes the fact that this employee has been given every opportunity to perform well and, as pointed out by the district court, presented no evidence to the Court that his treatment was race based. In its decision, the district court assumed that plaintiff's facts may have presented deficiencies in his training, but noted a complete absence of proof that the protected trait played a role in Freeland's conduct or that any of the deficiencies in their work relationship was due to a racist motivation. *See* App. at 16, which addresses Hurdle's failure to bring on proof of any circumstances

that could support an inference of race discrimination. By merely resting on his own opinion of himself and not filing any affidavits supporting his speculations, the case-law supports the court's decision that his *prima facie* case fails. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988).

The handwriting expert mentioned in no. 6 of the Questions Presented relates to an issue raised in his interrogatory response concerning the "fraudulent" editing of his correspondence by Freeland. *See* Petition at 18. Such an expert was used in a prior administrative grievance, but was not mentioned by Petitioner's prior counsel in written or oral submissions in his response to the Motion for Summary Judgment. Moreover, DEQ had objected to his designation as untimely and had moved to strike the expert's testimony. In addition, there is no expert report in the court's file opining that Supervisor Freeland is guilty of falsification or fraud.

3. Discriminatory Failure to Award Compensatory Time

The court found no evidence to support plaintiff's faulty belief that he was entitled to compensatory time for completing his "regular" work duties. The court considered the agency's chart (submitted to the EEO office of the Virginia Department of Human Resource Management, formerly the Department of Personnel and Training ("DPT") on "comp time," which was erroneously

described to the fourth circuit as "newly discovered evidence." It was included in the district court's record as Defendant's Encl. II, Exh. 3 (filed with the Defendant's Motion for Summary Judgment). This chart, which was discussed by the court and counsel extensively at oral argument, establishes that "comp time" was usually reserved for duties above and beyond one's regular duties and that on at least two occasions, Hurdle was awarded "comp time" by his supervisor Howard Freeland.

Without proof that he is *entitled* to pre-approval of compensatory time, Hurdle cannot establish a *prima facie* showing. *Keegan v. Dalton*, 899 F. Supp. 1503, 1513 (E.D. Va. 1995) (entitlement to benefit must be demonstrated). Nothing Hurdle states in his brief changes the fact that he simply wanted "comp time" to finish his annual reports, which represented his regularly assigned duties. His only proof that DEQ may have awarded it to others are hearsay statements attributed to co-workers Shawn Davis and Larry Syverson. Hurdle provides no proof and cannot rebut the information submitted to DPT. The chart in Encl. II, Exh. 3, clearly demonstrates that Hurdle got eight hours of "comp time" on the deadline date for the annual reports. His statement at his deposition that he saw Larry Syverson fill in time sheets for "comp time" is not accompanied with anything to prove that he got anything other than what is on the chart. Encl. I, Hurdle Depo. Tr. pp. 95-96. In sum, there is nothing before this Court to prove that the charted dates showing when Maria Williams and Larry Syverson received "comp time" are false. The evidence is that all staff members were

awarded compensatory time only for completing special duties. Hurdle was treated similarly to his counterparts.

B. Racially Hostile Environment

A plaintiff may establish a claim under Title VII, 42 U.S.C. § 2000e-2(a)(1) where harassment creates a hostile work environment affecting an employee's terms, conditions, or privileges of employment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Evaluating the alleged facts in the light of the requirements for a *prima facie* case of harassment also fails to produce a triable issue. In order to prevail on a hostile environment claim, Hurdle must prove that: (1) the employer harassed him because of his race; (2) the harassment was unwelcome; (3) it was sufficiently severe or pervasive to create an abusive working environment; and (4) there is a basis to impute it to the employer. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, *reh'g denied*, 121 S.Ct. 2246 (2001); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993).

Because Hurdle's evidence does not establish that he was subjected to sufficiently "severe or pervasive" altered work conditions, he cannot prevail as a matter of law. *Hawkins v. PepsiCo*, 203 F.3d 274, 276 (4th Cir.), *cert. denied*, 121 S.Ct. 181 (2000), is directly on point and dismisses a similar long list of allegations of inadequate instructions, unfair evaluations, and lack of access to a supervisor as not meeting the totality of circumstances test established in *Harris v. Forklift Sys.*, 510 U.S. at 21. Compare instead the actionable facts proven in *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183-84 (4th Cir. 2001), in

which the employee was treated to years of daily and relentless racial epithets that caused him to quit twice.

Like the employee in *Mathis v. Perry*, 996 F. Supp. 503, 515 (E.D. Va. 1997), Hurdle tries to cobble together everything and anything that has occurred to show race-based animus. At best, he can only prove that he and his supervisor disagree about his two-year experience as a permit writer. The isolated remarks attributed to Freeland are arguably rude, but not racist. He has no witnesses to show otherwise. Such trivial comments do not constitute an abusive environment. *Faragher*, 524 U.S. at 788; *Mathis*, 996 F. Supp. at 522. The documentation of good faith counseling sessions, training opportunities and the provision of a mentor belie any race-based hostility. As in *Mathis*, each evaluation was approved by several levels of supervisory personnel, none of whom have been shown to have discriminatory intent. Judging the totality of the circumstances, shows that Hurdle's two years under Freeland's supervision is not both objectively and subjectively hostile. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21-22 (1993).

As instructed in *Harris v. Forklift*, 510 U.S. at 23, and applied in *Smith v. First Union*, 202 F.3d 234, 242 (4th Cir. 2000), all of the circumstances must be evaluated, including: 1) frequency of conduct; 2) severity; 3) whether it's physically threatening or merely offensive; and 4) whether it unreasonably interferes with the employee's performance.

Even assuming Petitioner's litany in Interrogatory no. 4 is true; there is nothing severe that alters his work environment. This is particularly true given the mentor relationship and Freeland's, Romanchik's and Syverson's

daily editing and counseling attempts to improve this employee's work product and the undisputed fact that he was able to meet the August 1, 2000, annual report deadline.

In sum, the actual setting and circumstances surrounding the previously described "malicious and condescending" comments by Howard Freeland are set forth in Freeland's affidavit and unrebutted by Hurdle. The district court's analysis of this record also is consistent with sustained teachings of this court and interpretations of what constitutes an actionable hostile environment. As stated in the April 24, 2001, ruling of this Court in *Clark County Sch. Dist. v. Breeden*, 121 S.Ct. 1508, 1510 (2001), "[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment," *quoting Faragher*, 524 U.S. at 788. Hurdle's description – shown only through his affidavit, deposition concessions and interrogatory response – shows only that he felt he was poorly trained and unfairly evaluated. Again, the district court appropriately held that because his evidence of race based hostility was limited to his own subjective accounts, it fell short of severe and pervasive racial harassment.

C. Retaliation

Under § 704(a) of Title VII, it is unlawful for an employer to discriminate because plaintiff has opposed unlawful employment practices or filed a charge of discrimination. To establish a *prima facie* case, Hurdle must

show: (1) he engaged in a protected activity; (2) the employer took adverse action; and (3) there was a causal connection between the two. *Karpel v. Inova Health Sys. Serv.*, 134 F.3d 1222 (4th Cir. 1998), *citing Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). There are two types of protected activities: participation in an ongoing investigation or proceeding under Title VII, or opposing discriminatory practices prohibited by Title VII, 42 U.S.C. § 2000e-3(a). *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998). The district court did not differentiate between the two, but simply found that the protected activity was the August 1999 claim filed with the EEO Office of the Virginia Department of Personnel and Training.

In regard to the adverse action, the record is clear that Hurdle's negative evaluations by Howard Freeland began on July 16, 1999, and, therefore, occurred *prior* to the state charge or any other EEOC charges being filed. In *Clark County Sch. Dist. v. Breeden*, 121 S.Ct. 1508, 1511 (2001), this Court clearly held that such a scenario is not actionable retaliation: "Employers need not suspend previously planned [adverse action] upon discovering that a Title VII suit has been filed, and their proceeding along the lines of previously contemplated, though not yet definitively determined, is not evidence whatsoever of causality."

The record also is undisputed that the contested 1999 performance evaluation was changed in accordance with Hurdle's wishes. DEQ Manager Paylor recalls that the upward revision was intended to give plaintiff the benefit of the doubt and another year of training. He also was given his expected raise in 1999, and thus, suffered no

adverse employment action. The fourth circuit recently held in *Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001), that a lowered annual performance review with absolutely no impact on salary is not an "adverse" employment action. In that case, the court reviewed the statutory language in 42 U.S.C. § 2000e-(2), as analyzed in *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 366 (4th Cir. 1985), and *Munday v. Waste Mgmt. of N. Am.*, 126 F.3d 239, 243 (4th Cir. 1997), *cert. denied*, 522 U.S. 1116 (1998), and concluded that in order to be adverse and, thus, actionable under the anti-retaliation provisions, the action must affect the "terms, conditions or benefits" of employment. Like *Gunten*, Hurdle's evaluation did not affect his salary and, thus, is not actionable.

Temporal proximity is the way to prove the causation element of retaliation. As previously demonstrated, Hurdle does not have this in his favor. The district court properly found no causal relationship between the protected activity and the alleged adverse employment action of failing performance reviews in 1999. As in *Mathis v. Perry*, 996 F. Supp. 503, 515 (E.D. Va. 1997), the supervisor found fault with the employee's work well before the EEO complaint. As in *Clark County*, the employee's transfer was contemplated well before the protected activity. Hurdle's performance had been poor throughout the two-year period under review and the consistent feedback was caused by that and nothing else.

Even scrutinizing the events immediately after the lawsuit was filed, it is clear that Hurdle himself requested the interim performance meeting by way of a grievance dated May 15, 2000. He demanded this meeting and far from being retaliatory, the participants in the meeting did

everything they could to ensure that his Fall 2000 evaluation would be good: reviewing progress from two classes at J. S. Reynolds, assigning a mentor, and encouraging him to go see his doctor for his claim that his forgetfulness was due to medical problems – all this, despite being faced with a lawsuit. The counseling memo issued on July 28, 2000, for missing a staff meeting could not be retaliatory since it carried no disciplinary effect. Tying any of his supervisor's feedback to the May, 2000 filing of the lawsuit or the July 27, 2000, pre-trial conference at the district court is a ludicrous attempt to bolster this failing retaliation claim. Likewise, the August 2000 correspondence tracking sheet problem recited in the interrogatory response was put on hold until the agency's correspondence was audited, and no adverse employment action was taken against anyone as a result.

Even assuming that Hurdle presents a *prima facie* case of retaliation for DEQ's actions following either the DPT filing, the EEOC claim or the lawsuit, the burden shifts to DEQ to prove the legitimate, non-retaliatory reasons for their actions. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981). Again, under clear precedent of this Court, the respondent's burden is to produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by retaliatory animus. Because none of the asserted rationales have been effectively called into question as being false or contrived, Hurdle fails to establish an inference of discrimination through retaliation and he cannot escape an award of summary judgment.

D. Due Process Claims

As originally plead, this case raised, as a separate count, a claim under 42 U.S.C. § 1981. Prior counsel abandoned this approach in apparent recognition that no individual "state actor" had been named as a party defendant and that the agency is not a proper party in a § 1981 case. Neither the Commonwealth nor DEQ, a state agency, are "persons" within the meaning of 42 U.S.C. § 1981. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). The first three Questions Presented by Petitioner list due process violations and page 1 of the Petition lists several Amendments to the Constitution of the United States. All of this apparently relates to the old, abandoned theory of recovery. Any attempt to claim due process deprivations or unconstitutional infringement of contract must be dismissed for the failure to name an individual defendant.

CONCLUSION

The employer's evidence in support of its Motion for Summary Judgment was overwhelming in this Title VII suit. As set forth in the Respondent's Questions Presented and the accompanying arguments, the district court thoroughly reviewed the record in light of the controlling law on each count and issue. Moreover, the lower court also applied all reasonable inferences in favor of the employee and found that no reasonable juror would find his descriptions of these workplace disputes as being

motivated by intentional racial animus. There was no proof that the reasons taken for the employment actions at issue were false and, thus, no inference of discrimination could be reasonably drawn. For this reason, the judgment of the Fourth Circuit Court of Appeals contains no error and must be affirmed.

Respectfully submitted,

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No. 01-760

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In The
Supreme Court of the United States

In Re: Summary Judgement of Race Discrimination Case

KELVIN J. HURDLE,
Petitioner.

v.

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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54pp

QUESTIONS PRESENTED

1. Has an African American established a prima faces case if his version of all that is in dispute is accepted and he has established that he was treated differently than whites similarly situated and the legitimate business reason given by defendant is shown by exhibits to be false?

2. Does the fact that the supervisor demands that the plaintiff to request compensation time after the discrimination complaint is filed and after the deadline for the completion of the annual report projects, support a discriminatory work environment for plaintiff, when whites similarly situated are allowed compensation time for annual reports during the annual report review period of March through August.

3. Is the continuing actor of discrimination sufficiently named if he is itemized in the original complaint and affidavits as upper management and is personally disposed to establish the respective fact?

4. Is the continuing actor of discrimination sufficiently named if a specific time and date is given in the original complaint pinpointing a meeting that directly noted the continuing actor of discrimination through quotations and he is directly named on the first appeal.

5. Are retaliatory employment acts such as mental cruelty or the fraudulent changing of documents that are severe and pervasive enough to effect and alter work performance, sufficient to be considered an adverse action of employment.

PARTIES TO THE PROCEEDING

Petitioner:

Kelvin J. Hurdle

Respondent:

Virginia Department of Environmental Quality

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Forth Circuit in Kelvin J. Hurdle, Plaintiff-Appellant, versus The Commonwealth of Virginia, Department of Environmental Quality, Defendant-Appellee are unpublished. These opinions were reproduced in the Appendix to Petition for Writ of Certiorari ("Pet. App."). Copies of the Material Facts that are in Dispute and e-mails to establish the truth of the statement of facts are submitted herewith at Appendix ("App.") pages 1-10; 24-29.

JURISDICTION

The United States Court of Appeals for the Forth Circuit filed its Mandate on the judgment entered by the court on 7/16/01. A timely filed Petition for Rehearing and Rehearing En Banc was denied on August 22, 2001. The Petition for Writ of Certiorari was filed within 90 days of the denial of the Petition for Rehearing and the Brief in Opposition to the Writ of Certiorari has been filed. The court's jurisdiction is invoked pursuant to 28 U.S.C §§ 1254 (1) and 2106.

STATUTORY PROVISIONS INVOLVED

This action is brought on behalf of Kelvin J. Hurdle seeking to implement the provisions of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e, *et seq.* This Court has subject matter jurisdiction pursuant to (a) 28 U.S.C. § 1331, because the case arises under the Constitution and laws of the United States; (b) 28 U.S. C. § 1343 because this action seeks redress and damages for violation of 42 U.S.C. § 1983 and 1985, and in particular, the due process and equal protection provisions of the United States Constitution, including the rights protected in the Fifth, Ninth and Fourteenth Amendments. This Court has jurisdiction of the action under 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1345.

Venue is appropriate in this judicial district under 28 U.S.C. § 1391 (b), because Defendant is a state agency functioning in Richmond, Virginia, and a substantial part of the events giving rise to this Complaint occurred in Richmond, Virginia. Defendant the Department of Environmental Quality is a state agency maintained and funded in significant part by the Commonwealth of Virginia.

REBUTTAL TO RESPONDENT'S STATEMENT OF FACTS

A. "Hurdle" or "Petitioner" is an African-American male. He has been employed by DEQ since 1988, when he was hired as a Geologist. He was promoted in 1989 to the position of Geologist C, then again in 1996 to the position of Training and Development-Manager ("TD Manager"). 0n November 18, 1998, during an alleged reorganization of the DEQ, Hurdle was reassigned to the position of Environmental Engineer Senior. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. This Court has subject matter jurisdiction pursuant to (a) 28 U.S.C. § 1331, because the case arises under the Constitution and laws of the United States; (b) 28 U.S. C. § 1343 because this action seeks redress and damages for violation of 42 U.S.C. § 1983 and 1985, and in particular, the due process and equal protection provisions of the United States Constitution, including the rights protected in the Fifth, Ninth and Fourteenth Amendments. This Court has jurisdiction of the action under 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1345. Any reference to 42 U.S.C. § 1981 in original complaint was of typographical error. Clearly the original complaint stated that the cause of action was for violation of the fourteenth amendment rights and violating Title VII and Section 704(a) of the Civil Rights Act of 1964, as amended for engaging in protected activity.

B. The ("Respondent" or "DEQ") alleged that neither Hurdle's responses or Affidavits ("Aff's") or Exhibits "Exh" or deposition excerpts ("Depo.Tr.") contained any material facts that are in dispute. They also alleged that there wasn't any evidence that anyone at DEQ treated Hurdle differently because of race. The Appendices ("Material Facts that are in Dispute" reprinted at App. 1-10), ("Hurdle's Affidavit" reprinted at App. 17-23), ("Shelton's Affidavit" reprinted at App. 14-16), ("Depositional Excerpts-Plaintiff Discovery Designations" reprinted at App. 11-13), and (Factual E-mails relative to compensation time and the computer disc denied Hurdle reprinted at App. 24-29), all provide evidence that DEQ treated Hurdle differently relative to whites similarly situated.

C. Mr. David Paylor's depositional testimony page 9 lines 1-9, Page 11, lines 1-25 and the additional excerpts of Paylor's discovery designations proved that Mr. David Paylor was the manager that motivated the continued discrimination. Paylor's depositional testimony clearly showed that Paylor made the assessment that the training manager's " job was essentially administrative and was graded too high" when Mr. Hurdle was in the position. When Mr. Shelton was given the training manager's duties the grade level for the duties were ranked at a grade 16. Mr. David Paylor the manager that motivated the continued discrimination, also made comments to Mr. Hurdle stating to Mr. Hurdle that he was not going to have him making claims of racial discrimination. This event occurred while Mr. Hurdle was in his new position as Environmental Engineer Senior in December 1999. Hurdle raised this issue in the original complaint, and raised the respective issue on appeal. These facts clearly show that the demotion of Hurdle is clearly a related and continuing act of discrimination and is not a separate act and therefore is not time barred.

While working in the Environmental Engineering position, Plaintiff was consistently subjected to unequal terms and conditions of employment because of his race

black. A white co-worker also an Environmental Engineer reports to the same supervisor as the plaintiff. Plaintiff's Supervisor, allows Hurdle's white counterpart to work for overtime pay in order to complete projects. Yet plaintiff's requests for compensation time for overtime hours already worked and were routinely denied. Plaintiff's workload is greater than Maria Williams that was allowed compensation time for annual reports in July of 1999. Maria Williams was responsible for 25 annual reports and plaintiff was responsible for 76 annual reports. Plaintiff was required to request compensation time or not come into the office on 9/1/99 to review letters that pertain to the annual report. The supervisor knew that the annual reports were completed August 31, 1999 but demanded that plaintiff request compensation time. (Please see compensation time E-mails of appendix, App. 24-29). Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

The compensation timetable (App. 30-33) clearly showed that compensation time was issue for annual reports during the normal annual report project period but denied Hurdle. Hurdle only received compensation time after he filed a discrimination complaint August 26, 1999. Before that time however, Hurdle never received compensation time for any reason. In some instances as shown by the comp time chart in the submitted appendix (App. 30-33), whites similarly situated received comp time for annual reports and in some instances didn't have to have a reason to receive comp time. The respondent states that "specific reasons" or "out of the ordinary tasks" were required to receive comp time however, the comp time chart showed that whites similarly situated didn't have to have any reason and they did in fact receive comp time. The comp time chart in cross-reference with the e-mail (App. 30-33) clearly shows that Hurdle only received comp time for annual report letters not annual reports and received the comp time after the review period for annual reports was over.

D. DEQ intentionally denied Hurdle access to a computer disc that contained historical information helpful to the completion of Hurdle respective assignments. In accordance to DEQ's statement of fact, the district court assessed credibility to Freeland's affidavit, and determined that Freeland had no prior knowledge of Hurdle's claim of a request for computer disc. This statement clearly shows that the district court erred and assessed more credibility to Freeland affidavit than the complaint and affidavit of Hurdle. The respective e-mails in the submitted appendix (App. 24-29) clearly show a request for the computer disc that was copied to Freeland.

Hurdle was denied the disc by Shawn Davis and was denied by Freeland when he requested the respective disc for historical work information. Hurdle was never privilege to the computer disc however, he personally observed Mr. Jim Bernard receive the computer disc when Mr. Bernard first started in his similar new position. Such actions are clearly not workplace disputes. The District Court erred by viewing the Deficient Training, Supervisory Support, and Access to Tools of the Job in a more favorable light to the defendant. The evaluation of Mr. Hurdle with respect to his peers was primarily base on Freeland's Affidavit and ignored the depositional testimony of Mr. Hurdle page 79, lines 14-25 and page 80, line 1-25, and the deposition testimony of Freeland Page 15, Lines 12-25 and Page 16 lines 6-22; and Romanchik Page 17, lines 11-25 and Page 21, Lines 11-14.

E. The depositional excerpts of Mr. Dennis Treacy page 24 line 1-17 is evidence that Freeland was spoken to about his responses to Hurdle. These actions are proof that Freeland treated Hurdle differently. DEQ, never stated that Freeland was counseled or spoken to relative to comments made to white employees.

F. Hurdle clearly states in paragraph number 9 of the original complaint that DEQ's reluctance to talk to him about his Title VII concerns was a denial of due process and that whites were not treat the same when they wanted to discuss issues with management.

G. Plaintiff is frequently the target of derogatory comments by his supervisor. Plaintiff has on several occasions requested that his supervisor cease the use of derogatory comments. On or about May 17, 1999 the supervisor commented in a derogatory tone " I am going to whip you into shape". Within a month of that date, he commented " you don't have common sense". Other comments included " you have a warped mind", and "you don't have common sense". Nearly all-verbal communications by the supervisor are done with malice and in a condescending manner. Fraudulent actions taken by Freeland were documented and submitted to the court and were verified by handwriting expert Mr. Lawrence Farmer. (App. 36-37) These actions were not committed against white employees similarly situated.

REASONS FOR GRANTING THE PETITION

The Appropriateness of Defendants' Motion for Summary Judgment.

DEQ'S motion for summary judgement is only appropriate if there are no genuine issue as to any material fact, which would entitle defendant to judgement as a matter of law. Fed. R. Civ. P. 56(c). The ("Material Facts That are in Dispute") (*See* App. 1-10) clearly show issues of material fact that would not entitle defendant to a summary judgement as a matter of law. Since DEQ is the moving, the burden is on it to show the absence of any genuine issue of material fact.

The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to Hurdle since he is the party opposing the

motion. The district court erred with the credibility determination relative to Freeland's affidavit. *Ross, Id.*, at 364. Only where it is "perfectly clear that there are no issues in the case" is summary judgement proper. As the nonmoving party, Hurdle is entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from the evidence drawn in his behalf; and to be given the benefit of all favorable legal theories invoked by the evidence as considered. *Ross* at 364.

Federal Rule of Civil Procedure 56(C) required that the Court enter judgement against a party who, "after adequate time for discovery ... fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.v. Catrett*, 477 U.S. 317, 322 (1966). The essence of the inquiry that the Court must make is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby. Inc.*, 77 U.S. 242, 251-52 (1986). Summary judgement is proper "if the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." *Id.*, at 248. The Demotion Decision Claim Is Timely Because it Represents a Continuing Violation.

The defendant argues that Hurdle's claim that he was demoted for Training Manager's position because of his race is time barred because he filled this claim with the Equal Employment Opportunity Commission (EEOC) on February 9, 2000 which was more than 300 days after the demotion and occurred which was on November 1, 1998.

In order to avoid the "continuing violation" rule, defendant argues that the reassignment was "put into effect by John Cunningham, a black male, who is not implicated in Hurdle's claims of disparate treatment, hostile environment, and retaliation." This argument is without merit because

the complaint that is before the Court is based on a Title VII claim and the proper party in such a claim is the employer named in the EEOC Charge of Discrimination. *Mickel v. South Carolina State Employment Service*, 377 F.2d 239,242 (4th Cir. 1967), *cert. denied*, 389 U.S. 877, 88 S.Ct. 177, 19 L.Ed. 2d 166 (1967); *Alvarado v. Bd. Of T. of Montgomery Com. Coll.*, 848 F.2d 457 (4th Cir. 1988).

Defendant argues that the Fourth Circuit has not explicitly adopted a continuing violation test. This assertion is simply not true in light of the holding in *Brinkley-obu v. Hughes Training*, 36 F.3d 336 (4th Cir. 1994) in which the Court stated that "[a]long with the Supreme Court, we have applied the doctrine of continuing discrimination to Title VII, and Equal Pay Act compensation cases in which paychecks have been characterized as current or "continuing" violations. *Nelson v. Stone*, 958 F.2d 584, 592 (4th Cir. 1992); *Brewster v. Barnes*, 788 F2d 985, 993 (4th Cir. 1986); and *Jenkins v. Home Ins. Co.*, 635 F2d. 310, 312 (4th Cir. 1980)

Given the litany of events that Hurdle has experienced during his employment with the defendant and which he claims are discriminatory and/or retaliatory, the defendant's contention that the demotion and reassignment "simply constitute [d] the inevitable consequences of an earlier allegedly discriminatory decision do not suffice to create a continuing violation" is a factual determination that has been place in dispute by Hurdle in his response to the motion for summary judgement.

CONCLUSION

The evidence in the appendices submitted is overwhelming in opposition to a summary judgement for defendant in this Title VII case. DEQ intentionally denied Hurdle access to a computer disc that contained historical information helpful to the completion of Hurdle respective assignments. In accordance to DEQ's statement of fact, the district court assessed credibility to Freeland's affidavit, and

determined that Freeland had no prior knowledge of Hurdle's claim of a request for computer disc. This statement clearly shows that the district court erred and assessed more credibility to Freeland affidavit than the complaint and affidavit of Hurdle. Additionally, the Appendices clearly show that all the legitimate business reasons given for their discriminatory actions were false and therefore Hurdle has prevailed on establishing a prima facie case but was denied due process. There exist overwhelming evidence that the reasons taken for the employment actions at issue are false and thus, there is an inference of discrimination could be reasonable drawn. Freeland states that he had no knowledge of Hurdle's request for historical information on disc. E-mails prove that this statement to be clearly false. (App. 24-29) DEQ alleged compensation time is not given for annual reports. The compensation time chart submitted clearly shows this statement to be false. For these reasons, the judgment of the Fourth Circuit Court of Appeals contains multiple errors and must be reversed.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KELVIN J. HURDLE,
Plaintiff,

v. **Civil Action No. 3:00cv336**

COMMONWEALTH OF VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Comes now Kelvin Hurdle ("Hurdle") by and through his counsel and files herewith his opposition to defendant Commonwealth of Virginia Department of Environmental Quality's (DEQ), motion for summary and in support contends that the record reveals that there are genuine disputes as to material facts and therefore the defendant is not entitle to judgment as a matter of law.

MATERIAL FACTS THAT ARE IN DISPUTE

1. &4 states that Hurdle's reassignment was completed in accordance with state policy o layoff. Response: Hurdle was minimally qualified for the Environmental Engineer Consultant position, which was a grade 14 and was vacant and he should have been laterally transferred rather than being demoted to a grade 13. Hurdle's minimal qualifications were more extensive than what was contained in his written KSA because his knowledge and experience as an Environmental Engineer Senior gave him more than the minimal qualifications for the Environmental Engineer Consultant position.

2. &5 states that Hurdle told Cunningham that he wanted to work for another black employee, Wes Motley. Response: Hurdle denies stating this to Cunningham.

3. &6 states that Hurdle told Howard Freeland that he hand made a career decision to get out of the technical field and that he did not want the assignment in waste permitting. Response: Hurdle denies stating this to Freeland.

4. &8 states that Freeland reported Hurdle's absence from several sessions at a training conference in Florida to Hurdle's boss. Response: There was only one session that Hurdle did not attend at the training conference. Freeland also missed one training session, but no one said that his absence reflected poorly o DEQ and wasted agency funds.

5. It also states in the ▯ 8 that Freeland and Hurdle often discussed their mutual interest in cars. Response: Hurdle recalls that he and Freeland only discussed cars on two separate occasions.

6. &9 states that Freeland had better rapport with permit writers Bernard and Syverson, who enjoyed unrequested interaction. Response: Hurdle, unlike Bernard and Syverson, both of whom are white, was not given permit amendment training for more than a year after he joined Freeland's unit. Bernard and another white permit writer, Jeff Christie, were given this training immediately upon their assignment to the unit. Moreover, their permit amendment assignments gave them overtime opportunities, which Freeland denied to Hurdle.

7. &10 states that Hurdle's workload was average and it was not higher than that of either Larry Syverson or Shawn Davis, two white males in the section. Response: Hurdle agrees with this point. However, Syverson and Shawn Davis had far more experience than Hurdle because they had been in the Solid Waste Permitting unit for more than five years. Despite their greater experience tenure, Hurdle's workload was comparable

within two months of his transfer into this unit. This is in contrast to Freeland's treatment of Bernard and Christie who he gave reduced workloads during the first eight months they were assigned to the unit.

8. &12 states that Freeland required Maria Williams, a white female, to make up her missed time due to lateness. Response: Freeland required that Hurdle use his annual leave time to make up for his lateness.

9. &14 states that in the Summer of 1999, Freeland gave Hurdle an interim evaluation and that Hurdle did not grieve this evaluation. Response: Hurdle filed a discrimination charge with the State EEO office regarding this evaluation in August 1999. The basis of the charge was that Freeland had no facts to document or support this interim evaluation and refused to provide any support when requested by Hurdle.

10. &15 states that Hurdle is unsure whether Larry Syverson received comp time for annual report work. Hurdle did not concede this in his deposition. Response: Hurdle testified that Syverson told him in specific and unequivocal language that he received comp time for doing annual reports. It is important to note that neither Romanchik nor Freeland denied that Syverson received comp time in their affidavits.

11. &16 states that Freeland refused to pay Hurdle for the extra time he had worked. Response: Hurdle never asked Freeland to pay him for the over time he worked. Hurdle only asked for comp time despite the fact that Syverson told Hurdle that he was receiving over time pay.

12. &17 states that o September 23, 1999, Freeland completed Hurdle's annual evaluation and graded him as " FAIR BUT NEEDS IMPROVEMENT", and that Hurdle negotiated with Freeland and successfully got Freeland to raise several elements of the evaluation. Response: When Hurdle confronted Freeland with respect to the evaluation, Freeland admitted that he had not given

Hurdle adequate training. Freeland told Hurdle that he could not make changes in the evaluation without Romanchik's approval. Freeland and Hurdle then met with Romanchik and she agreed to change some of the areas in the evaluation. However, the overall evaluation was not changed.

13. &18 states that Cunningham observed that the training program was stalling under Hurdle's direction. Response: This statement was attributed to ¶14 in Cunningham's affidavit. Cunningham did not make this representation. He said that Hurdle's "career was stalling in the training manager's position and the reassignment to waste permitting was an opportunity for him to return to substantive work for the agency". It is interesting to note that in order to "unstall" Hurdle's career; Cunningham demoted Hurdle rather that grant his request for a lateral transfer.

14. &20 states that in the Fall of 1999, during the review of this evaluation, Paylor did not direct Hurdle not to tell people he was the victim of discrimination. Response: Hurdle took the encounter with Paylor as a direct threat about his accusations that he was a victim of racial discrimination by Freeland and Romanchik.

15. &24 states that Freeland asked Hurdle about his progress on drafting the First Piedmont amendment and that Hurdle told him that he did not know what a draft permit was. Freeland reminded Hurdle of the prior Shoosmith permit. Response: Freeland gave Hurdle his first draft permit amendment on April 14, 2000. Prior to that date, Hurdle had never done a draft permit amendment and had no training on this particular kind of project. The Shoosmith permit that Freeland referenced was not a permit amendment but was an annual report. Moreover, Shoosmith was a sanitary landfill and was in no way related to the First Piedmont project, which was an industrial landfill.

16. &25 states that on April 17, 2000, Freeland became frustrated and asked Hurdle to leave his office and that at a point in the discussion, Hurdle all of a sudden stated grinning and stood up and indicated that he wanted to shake hands with Freeland. Because nothing had been settled, Freeland thought that the handshake was an attempt to smooth over Hurdle's errors and was not a genuine agreement to try to do better work. Response: When Hurdle offered to shake hands with Freeland following a meeting in which Freeland became extremely emotional and testy, his gesture was a genuine attempt to diffuse and neutralize the situation not to make light of the incident. Freeland refused the gesture and did not shake Hurdle's hand.

17. &27 states that Hurdle would not make a decision on an issue with the Shoosmith landflll until Freeland told him, at least three times, to do so. Response: Hurdle did not refuse to make a decision with respect to the Shoosmith landfill. Hurdle's delay in reaching a decision was caused by Freeland's disagreement with Hurdle's review and position on this project.

18. &29 states that Freeland met with Hurdle on May 31, 2000 and June 6, 2000, at Hurdle's request. Response: Hurdle requested a meeting with Freeland and Romanchik on April 14, 2000 to discuss an interim evaluation in which Freeland rated Hurdle as "DOES NOT MEET EXPECTATIONS" in all categories. Hurdle filed suit against the agency on May 26, 2000 and almost immediately thereafter the two meetings were held. Hurdle believes that these meetings were not in good faith, but as a direct response to the law suit.

19. &31states that a Freeland issued a counseling memo to Hurdle on July 28, 2000 for intentionally failing to attend a very important meeting called by his colleague Maria Williams. With respect to the meeting that Hurdle did not attend, this meeting was held on June 13, 2000 and Maria Williams sent an E-mail advising that attendance was not mandatory. Hurdle did not attend the meeting because

he was working on the First Piedmont permit amendment that Freeland advised was a high priority project. Hurdle felt that his time would be better spent working on the amendment rather than attending the meeting.

20. &32 states that Freeland supported his evaluation of Hurdle on September 12, 2000 as "DOES NOT MEET EXPECTATIONS" in all categories by providing 16 examples of unsatisfactory customer service and documentation of poor commitment to the DEQ and copies of 30 annual report letters completed by Hurdle that contained more than one error per draft letter. Response: Freeland provided Hurdle with a mentor, Larry Syverson who was the most senior staff person working under Freeland. All of the negative findings that Freeland referenced in supporting his evaluation of Hurdle were reviewed by Syverson before they were submitted. Syverson did not bring any of the observations made by Freeland to Hurdle's attention before Hurdle submitted his work. With respect to the First Piedmont permit, Syverson specifically told Hurdle that since no one from the public attended the public hearing other than the permittee, First Piedmont, that no public comments were required. Hurdle relied on his assumption that Syverson would have pointed out any problems with his work. With respect to Freeland's comment that Hurdle had not entered or attempted to enter any data for four months prior to his evaluation, Hurdle states that his attempts to enter data were unsuccessful because he was not issued a proper pass word to gain access to the data bank despite his many complaints to Freeland during the four-month period. Hurdle has since been given a password and had entered data as necessary. Hurdle also sent a detailed rebuttal to September 12, 2000. (Exhibit 1).

21. &34 states that Freeland does not recall telling Hurdle he "would whip him into shape"; that Freeland does not remember saying to Hurdle. "I will not have a child working for me"; that Freeland does not recall making the comments "you do not have common sense or

you are not professional." Response: Hurdle specifically recalls these incidents and that Freeland intended to demean and embarrass him when they were said.

22. &36 states that Hurdle had an unapproved outside job. Response: Hurdle consistently filed with the Agency a conflict of interest form in which he revealed his outside business interests. He thought that this was all that he was required to do. In 1999, Hurdle was told that he was required to complete a specific form regarding his outside business and he did so and it was approved.

23. &37 states that in September 2000, Larry Syverson asked Hurdle to inventory his office of his pending work projects so that they could discuss his workload and Hurdle refused more than once to do this, claiming his papers were being tampered with and that on October 23, 2000, Syverson issued Hurdle a Group II disciplinary notice for failing to follow his supervisor's instructions, with no accompanying suspension. Response: Hurdle filed a grievance with respect to the Group II notice and the grievance is presently pending. This issue came up after Hurdle designated in this lawsuit a handwriting expert who opined that a written notation made on a document was done by Freeland. Freeland had accused Hurdle of making this notation. Hurdle was then told that he was the subject of an investigation that could lead to criminal charges against him for making other notations in files he was working on so that he would not have to do required work.

24. &Hurdle was concerned that he was being set up with regard to certain files that were in his office and requested that Syverson review these files himself in order to avoid an accusation that he, Hurdle, tampered with these files. Hurdle's refusal to follow Syverson's instructions was intended to protect himself not to disregard a legitimate instruction by his supervisor.

25. Joseph F. Shelton was employed by the Department of Environmental Quality (DEQ) from September 10, 1997 until December 24, 1998, when he voluntarily resigned from the Agency. Shelton Aff. &1.

26. In his first position at DEQ, Shelton held the title of Division Director of Administrative Support, which was a pay grade 17 position. In this position, he reported to the Director of the DEQ. Shelton Aff. &2.

27. At the time Shelton assumed these duties, the plaintiff, Kelvin Hurdle, was assigned in the position of Training Manager which was pay grade 14 position. Hurdle was however on temporary assignment in the Underground Storage Tanks unit. Hurdle returned to Training Manager's position in early December 1997. Shelton Aff. &3.

28. In the Summer of 1998, as a result of a reorganization, Shelton's position was abolished and he was demoted to Director of Human Resources, which was a pay grade 16 position. At the time of his demotion, Shelton's pay was not reduced, however, the ceiling for future pay increases were lower than it was in pay grade 17. In this position he reported to John E. Cunningham Jr., the Director of Administration. Shelton Aff. &4.

29. On or about September 30, 1998, Shelton found out that DEQ was advertising for his position. He had not been advised that he was being replaced and was shocked when he learned about this. Shelton Aff. &5.

30. At that time, Hurdle was in Shelton's office and they were discussing training. Hurdle said to Shelton, "I bet you that they are going to reassign you to my job, Training Manager." Shelton Aff. &6.

31. Cunningham came to Shelton's office and Shelton asked him what he had done to deserve this treatment. Cunningham asked Shelton to come up to his office so they could discuss the matter. Shelton Aff. &7.

32. Shelton went up and talked with Cunningham and Cunningham told Shelton that he was going to demote him and give him the position as Training

Manager, pay grade 14. Cunningham said that Shelton would not loose any current pay, but the pay grade position had a maximum salary that was at or near his present salary as a pay grade 16. Shelton Aff. &8.

33. Shelton asked Cunningham what was going to happen to Hurdle. Cunningham said that he was going to move Hurdle but did not say where. Shelton Aff. &9.

34. Hurdle later told Shelton that a position had been created for him in the waste permit unit at a pay grade 13. Shelton Aff. &10.

35. Before Shelton's reassignment took effect, Shelton was told that the Department of Personal Training (DPT) had contacted Cunningham and he was told that he did follow procedure in demoting and reassigning Shelton and that there were no grounds to demote Shelton because his evaluations were that his performance fully met expectations. Shelton Aff. &11.

36. On or about October 16, 1998, Cunningham advised Shelton that he was not going to be demoted and that a position was being created for him, Environmental Quality Assistant Division Director in the Division of Administration at pay grade 16, effective October 19, 1998. Shelton Aff. &12. Exhibit 1, Cunningham Aff. Encl. III.

37. The duties in this position consisted almost exclusively of those duties that Hurdle performed as Training Manager. Shelton Aff. &13.

38. At this time Shelton was placed in that position, he had no experience at DEQ as a Training Manager, except as the supervisor the position. In fact, Hurdle could have carried out the duties in this position. Shelton Aff. &14.

39. On or about October 7, 1998, Shelton prepared an evaluation on Hurdle for his performance as Training Manager. Shelton rated Hurdle's performance that he fully met expectations. Shelton Aff. &15.

40. Cunningham signed and approved the evaluation on October 28, 1998. Cunningham did not mention or say to Shelton that he thought Shelton's evaluation of Hurdle was "inflated," nor did Cunningham make any comments on the evaluation, which he had every right to do. Shelton Aff. &16. Exhibit 17, Hurdle Tr., Encl. I.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KELVIN J. HURDLE.
Plaintiff,

v. Civil Action No. 3:00cv336

COMMONWEALTH OF VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant.

PLAINTIFF'S DISCOVERY DESIGNATIONS

Comes now the plaintiff, Kelvin Hurdle, by and through his counsel an submits his designations to the discovery taken in the above styled case as follows:

Deposition Testimony of Dennis H. Treacy:

Page 3, Lines 3-13
Page 23, Lines 23-25
Page 24, Lines 1-17
Page 27, Lines 20-25
Page 28, Lines 12-20
Page 36, Lines 3-25
Page 37, Lines 2-6, 19-23
Page 38, Lines 8-25
Page 16, Lines 6-22
Page 18, Lines 10-18
Page 57, Lines 10-24
Page 58, Line 1-2
Page 69, Lines 4-11, 24-25
Page 70, Lines 1-5
Deposition Testimony of David Paylor:
Page 10, Lines 8-25
Page 11, Lines 1-25

Page 14, Lines 14-25
Page 15, Lines 1-19
Page 30, Lines 15-25
Page 31, Lines 1-6
Deposition Testimony of
Leslie A. Romanchik:
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Page 15, Lines 22-25
Page 17, Lines 11-25
Page 21, Lines 11-14
Page 23, Lines 1-12
Page 24, Lines 8-25
Page 26, Lines 1-25
Page 27, Line 1
Page 28, Line 25
Page 29, Lines 1-2
Page 30, Lines 2-24
Page 31, Lines 11-23
Page 32, Lines 15-25
Page 33, Lines 1-8
Page 39, Lines 19-25
Page 40, Lines 1-3
Page 43, Lines 7-25
Page 44, Lines 1-18
Page 46, Lines 13-25

Respectively submitted,

KELVIN J. HURDLE

By /s/Beverly D. Crawford
Of Counsel

Beverly D. Crawford, Esquire
4221 Chamberlayne Avenue
Richmond, Virginia 23227

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was mailed postage pre-paid to Martha M. Parish, Esquire, Assistant Attorney General, 900 East main Street, Richmond, Virginia 23219, on this 21st day of November 2000.

/s/Beverly D. Crawford

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KELVIN J. HURDLE,
Plaintiff,

v. Civil Action No. 3:00cv336

COMMONWEALTH OF VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant.

AFFIDAVIT OF JOSEPH F. SHELTON

Joseph F. Shelton, having been duly sworn, says:

1. My name is Joseph F. Shelton. I was employed by the Department of Environmental Quality (DEQ) from September 10, 1997 until December 24, 1998, when I voluntarily resigned from the Agency.

2. In my first position at DEQ, I held the title of Division of Administrative Support which was a pay grade 17 position. In this position, I reported to the Director of the DEQ.

3. At the time I assumed these duties, the plaintiff, Kelvin Hurdle, was assigned in the position of Training Manager which was a pay grade 14 position. Kelvin was however on temporary assignment in the Underground Storage Tanks unit. Kelvin returned to the Training Manager's position in early December 1997.

4. In the Summer of 1998, as a result of a reorganization, my position was abolished and I was demoted to Director of Human Resources which was a pay grade 16 position. At the time of my demotion, my pay was not reduced, however, the ceiling for future pay increases was lower than it was in pay grade 17. In this position I

reported to John E. Cunningham, Jr. the Director of Administration.

5. On or about September 30, 1998, I found out that DEQ was advertising for my position. I had not been advised that I was being replaced and was shocked when I learned about this.

6. At that time, Kelvin was in my office and we were discussing training. Kelvin said to me, "I bet you that they are going to reassign you to my job, Training Manager."

7. Cunningham came to my office and I asked him what I had done to deserve this treatment. Cunningham asked me to come up to his office so we could discuss the matter.

8. I went up and talked with Cunningham and he told me that he was going to demote me and give me the position as Training Manager, pay grade 14. He said that I would not lose any current pay, but the grade 14 position had a maximum salary that was at or near my present salary as a pay grade 16.

9. I asked Cunningham what was going to happen to Kelvin. He said that he was going to move Kelvin but did not say where.

10. Kelvin later told me that a position had been created for him in the waste permit unit at a pay grade 13.

11. Before the reassignment that was told to me by Cunningham took effect, I was told that the Department of Personnel and Training (DPT) had contacted Cunningham and told him he did not follow procedure in demoting and reassigning me and that there were no grounds to demote me because my evaluations were that my performance fully met expectations.

12. On or about October 16, 1998, Cunningham advised me that I was going to be demoted and that position was being created for me, Environmental Quality Assistant Division Director in the Division of Administration at pay grade 16, effective October 19, 1998.

13. The duties in this position consisted almost exclusively at those duties that Kelvin performed as Training Manager.

14. At the time I was placed in that position, I had no experience at DEQ as a Training Manager, except as the supervisor of the position. In fact, Kelvin could have carried out the duties in this position.

15. On or about October 7, 1998, I prepared an evaluation on Kelvin for his performance as Training Manager and I rated that his performance met expectations.

16. Cunningham signed and approved the evaluation on October 28, 1998. Cunningham did not mention or say to me that he thought my evaluation of Kelvin was "inflated" nor did he make any comments on the evaluation which he had every right to do.

Upon my oath, and under the penalty of perjury, I state that my foregoing statements are true and accurate.

Date /s/Joseph F. Shelton
Joseph F. Shelton

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KELVIN J. HURDLE,
Plaintiff,

vi. Civil Action No. 3:00cv336

COMMONWEALTH OF VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant.

AFFIDAVIT OF KELVIN HURDLE

Kelvin Hurdle, having been duly sworn, says:

1. I am the plaintiff in the above styled case.

2. The responses that were made in Paragraphs 1 through 24 in the Material Facts That Are in Dispute section of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment are true and accurate.

3. In June 1998, I attempted to join in with a few HRO staff in a normal discussion. Caroll Harris, a white female of DEQ/HRO, whose position is unknown, called me "boy" and when I looked incredulously at her, she repeated it. I told Joe Shelton about the incident and he aid he would speak to her about it.

4. White staff have received personal faxes in the office and no action was taken against them. However, when I received a personal fax at the office, Howard Freeland gave me a written reprimand which caused me to be embarrassed, humiliated and depressed.

5. During the time I was under Howard Freeland's supervision, he created a hostile work environment. Nearly all of Freeland's verbal communication with me were done in a malicious and condescending

manner. I constantly had to ask Freeland to calm down when he interacted with me. It was rare when Freehand was not hostile and argumentative toward me. Freeland's interaction with white staff was completely different in that he communicated with them in a calm and pleasant demeanor.

6. Examples of Freeland's derogatory comments directed at me are: He has said, "I'm going to whip you into shape". On or about May 17, 1999, he said to me, ""You have a warped mind." I do not recall the date of the last comment.

7. Freehand treated me differently form white coworkers regarding my arrival time at work. Freehand almost daily monitored my time of arrival at work. When I was fifteen minutes late, Freehand required me to fill out a leave request and charged my lateness to my accrued leave, while white staff were allowed to make up their late arrival by working the additional time at the end of the day and their annual leave was not used to make up for their late arrival.

8. Freehand told me on several occasions that he did not have time to discuss my work acting as if he was too busy to engage me in positive and productive discussions. Immediately after saying this to me, I watched him fraternizing with white male staff for a considerable length of time, which indicated that he was not too busy. When Freehand saw me watching him fraternizing, he would shut his office door.

9. The agency maintains a computer system on which is stored historical information regarding previous work done by the agency. This information is important in the work we do at the agency and it greatly simplifies a lot of the work we do. When I requested Freehand to allow me access this information to assist me in working on my assigned projects, he regularly refused my requests. My requests were made orally and in writing. My white coworkers were given access to this information.

10. One example of this occurred when Jim Bernard, a white male, was given access to this information within a week after he arrived at the agency. When I mentioned this to Bernard and told him that I had been denied access to this same information, he acted surprised and told me that he put the information in a common file that did not require limited access.

11. On July 27, 2000, Bernard and I were traveling to Chatham, Virginia for a public hearing. During the trip, Bernard said to me without any prompting from me that he really believed that Howard Freehand is a racist. He said he came to that conclusion because Freehand treated me different from the way he treated my white coworkers.

12. From December 1998 to June 2000, there was a practice at the agency or at least in the department in which I worked to give all employees job training, Freehand refused to assure that I was given adequate training. For example, Freehand would set up specific training protocols for whites to assure that they were trained in specific areas of their duties and responsibilities. He would monitor their training progress. Freehand refused to do the same for me. In fact, Freehand would instruct me to do specific project knowing full well that I had not received any training in that area. My employment was adversely affect because it took far more time to do the work that would have been necessary had I been given proper training. During the same time period, when whites first came to the department, they were assigned a mentor. I was in the department for more than eighteen months before Freehand got around to assigning me a mentor.

13. From December 1998 to the present, Freehand refused to approve compensatory time to offset the excessive time that I needed to complete my assigned projects, while he approved compensatory time for white staff on a regular and consistent basis.

14. From March 1999 to the present, from time to time I would find inadequate monitoring system for land

fills in the State. When I made this observation in my report, Freehand took issue with my findings and ordered me to reverse my opinion and certify that the monitoring system was working properly. He did this without giving or explaining to me a scientific justification as to why my observation and conclusion was wrongs.

15. When Freehand dealt with my white coworkers and reversed their findings and observations, he gave them a detailed scientific explanation. This was not simply a difference in his attitude and demeanor toward me, but he also deprived me of valuable training because by explaining his reasoning as he did with my white coworkers he provided them with an opportunity to learn from their mistakes and to have positive feed back regarding their work.

16. From December 1998 to September 1999, Freehand intentionally created a communication barrier during my first months on the job, effectively reducing the quality of my training. No training plan was ever devised, presented or reviewed with me. Although an overall plan was presented to HRO, its detail were never reviewed. In contrast, quality training time was spent with new white employees this year,

17. There were several acts of retaliation that occurred as follows:

a. After I was evaluated as meeting the requirements of the job, I was removed from the training managers position in December 1998 and demoted.

b. On May 31, 2000, I was given an interim performance evaluation which stated that I did not meet the requirements of my position. My federal complaint was filed on May 26, 2000 and served on the Department that same day. The Department and Freehand were aware of the Complaint before the interim performance was prepared.

c. On June 8, 2000, I was given a counseling memo for alleged poor performance.

d. On July 28, 2000, I received a counseling memo for not attending a non-mandatory meeting on June 13, 2000, which was six weeks prior to the incident. The memo was given one day after I attended a pretrial conference with Judge Payne, during which he advised the Department to find me a job with another agency. Immediately after the pretrial conference, I saw and spoke with the Department's Director, Dennis Tracey who was in the Court House. During my previous encounters with Tracey, he was always friendly, however on July 27, 2000, when he spoke briefly in the Court House, he appeared drawn and distant toward me.

e. Freehand fraudulently changed a notation on a Report Cover Sheet, Tracking ID WP200 1003 with a response date of 8/24/00 that I prepared. I put on the sheet the word "Yes" in the block indicating whether a response was due to the letter received. On this sheet there was a circle drawn around the word "Yes" and a line drawn from the circle to the center of the sheet where another circle was drawn around the word "No."

f. Freehand alleged that I made the handwritten entry and wrote the word "No" on the sheet when in fact he was the one that did this.

g. Freehand then reprimanded me for an act that he committed and repeated his false and fraudulent accusation in the presence of Leslie Romanchik on August 11, 2000.

h. I notified Romachick and Freehand regarding this on or about September 7, 2000.

18. Joe Shelton, my supervisor when I was training manager, told me that upper management had discussed removing me from the training manager position, and could not give him a reason for the action.

19. When I asked for the legitimate, business reason for demotion, I received no answer.

20. There were also some peculiar and questionable circumstances surrounding my demotion, because at the time of my demotion, Joe Shelton was in the position of Director of Human Resources, which was a Level 16 position.

21. He told me that he was told by John Cunningham, Director of Administration that he was being taken out of his Human Resources position and would assume my duties as Training Manager which was a Level 14 position, at least when I performed those duties.

22. Shelton complained that if he assumed those duties, it would mean that he was going to receive a two level demotion from a Level 16 to a Level 14.

23. Cunningham then made arrangements to have Shelton's new position changed from Training Manager to Assistant Director of Administration and the position was given a Level 16 designation.

24. At the time of my demotion, I received a satisfactory performance evaluation and I met all of the requirements for the position. I was better qualified than Shelton to continue the duties as Training Manager because Shelton had absolutely no experience or training for that position.

25. Also, there was an existing vacancy in the Department for an Environmental Engineer, Level 14. I was minimally qualified for that position. I was not considered for that position despite the fact that there is a policy and practice in the Department that requires that prior to demoting an employee, that an attempt be made to laterally move that employee to a position vacancy where that employee is minimally qualified. This policy was not exercised in my case, while it was exercised for Shelton's benefit.

Upon my oath, and under the penalty of perjury, I state that the my foregoing statements are true and accurate.

Date /s/ Kelvin Hurdle
Kelvin Hurdle

To: Kelvin J. Hurdle@GCA@DEQ
Cc:
Bcc:
From: Shawn E. Davis@GCA@DEQ
Subject: re: Facility letters
Date: Friday, August 6, 1999 8:59:40 EDT
Attach:
Certify: N
Forwarded by:

Kelvin,

Copies of all my letters are in the facility file along with the facility submittals. You really need to read both to understand the situations. Regardless, I'm leaving an electronic copy of all my letters for SW & HW with Howard. Also, I will leave my personal files behind so that whomever is assigned my projects can use them or trash them. Later Tater.

To: Shawn E. Davis@GCA@DEQ
Cc: Howard R. Freeland@GCA@DEQ
Bcc:
From: Kelvin J. Hurdle@GCA@DEQ
Subject: re: Facility letters
Date: Friday, August 6, 1999 8:52:48 EDT
Attach:
Certify: N
Forwarded by:

How about giving me a copy of the database of letters that you have. Specifically, the letters that pertain to the sites that you have turned over to me.

Thanx!

To: Kelvin J. Hurdle@GCA@DEQ
Bcc:
From: Howard R. Freeland@GCA@DEQ
Subject: annual reports
Date: Wednesday, August 25, 1999 15:04:36 EDT
Attach:
Certify: N
Forwarded by:

According to my records, 5 annual report reviews were completed and so far for this week 2 annual reports have been reviewed. Since Shawn gave you 25 before you left and Larry has done two of those, I'm guessing that you have about 16 left to do. Is that right?

As you know all annual reports must be reviewed by 9/1/99. That only leaves 4 working days and 40 hours left for completion of the reports.

I'll be out of the office tomorrow, but please let me know by email by Friday the status. Don't spend much time on it, I just need to know numbers.

To: Howard R. Freeland@GCA@DEQ
Cc:
Bcc:
Fr: Kelvin J. Hurdle@GCA@DEQ
Subject: re: annual reports
Date: Tuesday, August 31, 1999 11:34:58 EDT
Attach:
Certify: N
Forwarded by:

Just thought I let you know that Lee Co. is now my last annual report to review. You said we are to discuss it.

To: Howard R. Freeland@GCA@DEQ
Cc: Leslie A. Romanchik@OPM@DEQ
Bcc:
Fr: Kelvin J. Hurdle@GCA@DEQ
Subject: Comp time/and leave taken
Date: Thursday, September 2, 1999 7:55:41 EDT
Attach:
Certify: N
Forwarded by:

As per your request, I sent you an e-mail yesterday stating that I will be earning 8 hrs. comp time of 9/1 and taking 10 hrs leave for 9/2.

I have touched base with you today to make sure all paperwork is appropriate. Your comments were that "we are all straight as for as my time is concern". If there are any "time issues" that we must discuss please let me know.

Now, that the annual reports are done, and I am allowed to earn comp time, can you please tell me what the desired procedure should be?

To: Howard R. Freeland@GCA@DEQ
Cc:
Bcc:
Fr: Kelvin J. Hurdle@GCA@DEQ
Subject:
Date: Wednesday, September 1, 1999 10:26:43 EDT
Attach:
Certify: N
Forwarded by:

I am going to work 8 hr comp time today and turn in 10 hours annual leave for Thursday.

COMMONWEALTH OF VIRGINIA
SARA REDDING WILSON
Department of Human Resources Management
Exhibit II

Employee Name	Race	Position Title	Date and Amount of Compen-satory Time Granted	Reason for Granting Compen-satory Time
Kelvin J. Hurdle	B	Env. Eng. Sr.	09/01/99 8.0 hours	Letter pertaining to annual reports
Larry Syverson	W	Env. Eng. Sr.	02/03/99 2.4 Hours	On site sampling in Bedford County
Larry Syverson	W	Env. Eng. Sr.	02/04/99 2.0 Hours	On site sampling in Bedford County
Larry Syverson	W	Env. Eng. Sr.	02/09/99 5.5 Hours	On site sampling in Bedford County
Larry Syverson	W	Env. Eng. Sr.	02/16/99 4.0 Hours	Caroline County Landfill Public Hearing
Larry Syverson	W	Env. Eng. Sr.	02/2/99 1.5 Hours	Reports for Solid Waste
Larry Syverson	W	Env. Eng. Sr.	02/23/99 1.0 Hours	OSHA Training
Larry Syverson	W	Env. Eng. Sr.	04/20/99 4.0 Hours	Public Hearing

Larry Syverson	W	Env. Eng. Sr.	05/10/99 5.5 Hours	Public Hearing
Larry Syverson	W	Env. Eng. Sr.	06/15/99 1.0 Hour	Public Hearing
Larry Syverson	W	Env. Eng. Sr.	06/16/99 6.0 Hours	Public Hearing
Larry Syverson	W	Env. Eng. Sr.	06/17/99 4.0 Hours	Public Hearing
Larry Syverson	W	Env. Eng. Sr.	06/22/99 8.0 Hours	Public Hearing
Larry Syverson	W	Env. Eng. Sr.	07/14/99 3.0 Hours	Public Hearing
Larry Syverson	W	Env. Eng. Sr.	07/15/99 4.5 Hours	Public Hearing
Maria Williams	W	Env. Eng. Sr.	01/06/99 3.0 Hours	
Maria Williams	W	Env. Eng. Sr.	02/02/99 5.0 Hours	Bedford County Split Sampling
Maria Williams	W	Env. Eng. Sr.	02/03/99 3.0 Hours	Bedford County Split Sampling
Maria Williams	W	Env. Eng. Sr.	02/05/99 11.0 Hours	Bedford County Split Sampling
Maria Williams	W	Env. Eng. Sr.	03/24/99 5.0 Hours	Public Hearing
Maria Williams	W	Env. Eng. Sr.	05/21/99 10.0 Hours	
Maria Williams	W	Env. Eng. Sr.	05/25/99 2.0 Hours	Solid Waste Implementation

Maria Williams	W	Env. Eng. Sr.	05/26/99 1.0 Hour	Solid Waste Implementation
Maria Williams	W	Env. Eng. Sr.	05/28/99 1.5 Hours	
Maria Williams	W	Env. Eng. Sr.	05/30/99 4.0 Hours	
Maria Williams	W	Env. Eng. Sr.	06/02/99 1.0 Hour	Waste Regulations
Maria Williams	W	Env. Eng. Sr.	06/04/99 8.0 Hours	Waste Regulations
Maria Williams	W	Env. Eng. Sr.	06/08/99 2.0 Hours	Waste Regulations
Maria Williams	W	Env. Eng. Sr.	06/09/99 2.0 Hours	Medical Waste Sampling
Maria Williams	W	Env. Eng. Sr.	06/11/99 2.0 Hours	Medical Waste Sampling
Maria Williams	W	Env. Eng. Sr.	06/14/99 1.0 Hour	Medical Waste Sampling
Maria Williams	W	Env. Eng. Sr.	06/17/99 1.0 Hour	Medical Waste Sampling
Maria Williams	W	Env. Eng. Sr.	06/22/99 2.0 Hours	Medical Waste Sampling
Maria Williams	W	Env. Eng. Sr.	06/23/99 2.0 Hours	Medical Waste Sampling
Maria Williams	W	Env. Eng. Sr.	06/23/99 2.0 Hours	Medical Waste Sampling
Maria Williams	W	Env. Eng. Sr.	06/25/99 8.0 Hours	Medical Waste Sampling

Maria Williams	W	Env. Eng. Sr.	06/28/99 1.0 Hour	Medical Waste Sampling
Maria Williams	W	Env. Eng. Sr.	07/09/99 4.0 Hours	ATC CME
Maria Williams	W	Env. Eng. Sr.	07/16/99 9.0 Hours	DCDC Solid Waste Staff
Maria Williams	W	Env. Eng. Sr.	07/30/99 8.0 Hours	Annual Reports
Maria Williams	W	Env. Eng. Sr.	08/09/99 4.0 Hours	ABEX Camp
Maria Williams	W	Env. Eng. Sr.	08/13/99 9.0 Hours	Grant Projects

Lawrence M. Farmer
INCORPORATED
Examiner of Questioned Documents

PERSONAL RESUME

Qualifying Experience:

1978-Present **Examiner of Questioned Documents,** Virginia Beach, VA Engaged in scientific examination of questioned documents with specialty in disputed signatures and questioned handwriting. Also skilled in examination of altered documents, medical records, typewriter identification and all phases of document problems. Photographic facilities include ultraviolet and infrared equipment for study and for preparing exhibits. Examinations are conducted for attorneys, state prosecuting attorneys, law enforcement officials and the general public. Appointments by the Court are welcomed. Detailed reports are prepared to specify the results of an examination, if desired. The reports and photographic exhibits have a dispositive effect. Extensive experience as an effective witness.

1954-1978 **United States Secret Service,** Washington, D.C., Richmond & Norfolk, VA
Special Agent and Special Agent in Charge. Handwriting comparisons were made on a daily basis while investigating the forgery of thousands of Government checks and bonds and in investigating threatening and anonymous letters to the President of the United States.

Education	**College of William and Mary** Williamsburg, VA Bachelor of Arts Degree, 1951
Training:	**Questioned Document School** United States Secret Service, 1964
Qualifications:	Can qualify in any court as an expert in the identification of questioned or disputed handwriting and signatures.
Personal and Professional References:	**Upon request.**
Fee Information:	Basic fee is $95 per hour for all services. Exact quotations can usually be offered in advance. Appropriate charges are necessary for travel expenses. When appointed by the Court the fee may be determined by the Court. Preliminary examinations can usually be conducted with photocopies or photographic copies of the documents, forwarded by mail, in order to reduce travel and minimize costs.

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Lawrence M. Farmer, Incorporated
Examiner of Questioned Documents

5317 Challedon Drive,
Virginia Beach, Virginia 23462
Phone: (757) 490-2914

October 9, 2000

REPORT OF EXAMINATION

The purpose of the examination was to ascertain whether Kelvin J. Hurdle wrote the "No" response on a document which is described below where it is designated with a Q-1 prefix.

Q-1 Photocopy page, 11' X 8.5', with a copy of REPORT COVER SHEET, Tracking ID WP2000 1003, Response Date 8/24/00, From Michael Lawless Draper, Company Draper Lawless, with a Referring Date 7/28. Response Yes and Comment Ltr. Dtd 7/18; Response DEQ Ltr. 6/30/00. A circle has been drawn around the "Yes" response and a line drawn from the circle to more than one inch below the REPORT COVER SHEET where a circle is drawn around the questioned "No" entry.

The following documents were provided for comparison with the questioned Q-1 entry.

K-1 Two groups of documents, with labels, "Employee A" (5 documents) and "Employee A Additional Documents" (6 documents).

K-2 Two groups of documents, with labels, "Employee B" (12 documents), and "Employee B Additional Documents" (15 documents).

Appropriate examination and comparison was made of K-1 and K-2 and Q1. When this procedure was completed 1 formed the opinion set forth below.

It is my POSITIVE OPINION the questioned notation "No", on Q-1, was written by the author of K-2. This writer sometimes makes a conscious or deliberate stroke from the upper right corner of the "N" to the "o". Sometimes the mark is thin and it is not a deliberate stroke. It is a dragging mark.

The K-1 writer, Employee A, has a connection stroke that goes from the lower right corner of the "N" to the "o".

Examination of large writing samples of both writers will I am confident confirm the observations made in this Report of Examination. If testimony is desired it is requested that I be notified at the earliest possible date. All documents provided for use in the examination are enclosed with the original of this report.

Lawrence M. Farmer